89-287 (1)

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC.,

Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,

Respondents.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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August 18, 1989

1989

MOTION FOR LEAVE TO INTERVENE

Pursuant to S. Ct. R. 42, the National Right to Work Legal Defense and Education Foundation, Inc. (the "Foundation"), moves for leave to intervene in this action in order to present a petition for writ of certiorari and to defend its First and Fifth Amendment interests, as well as its reputation, which came under attack for the first time when the United States Court of Appeals for the Seventh Circuit rendered its judgment and opinion in *Gilpin v. AFSCME*, 875 F.2d 1310, on May 24, 1989.

Gilpin was brought in 1985 by nine nonunion, public employees subject to compulsory union fees, who sought to protect their First Amendment rights to precollection notice and objection procedures, as enunciated a year later in *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). Eventually, the case was dismissed as moot. One employee, Jack Gilpin, appealed.

The employees were represented in the District Court by an independent, private attorney and his law firm, who also entered their appearances at the Court of Appeals. The Foundation did not provide their services. On appeal, a Foundation-provided attorney, Milton Chappell, also entered his appearance and handled the appeal as lead counsel. The Foundation's name appeared *pro forma* as part of Mr. Chappell's address. Otherwise, the record was devoid of any reference to the Foundation.

The Foundation is not a party to this action. Not being a law firm, it is not a legal representative of any party. Nonetheless, the Court of Appeals made numerous determinations as if the Foundation were both a party and Gilpin's counsel: that the Foundation sought a "restitution" remedy; that the Foundation "represented" the employees; that the Foundation failed to challenge an extra-judicial arbitrator's decision; that the Foundation was not an adequate litigation representative for some employees; and

that the Foundation did not seek certification of two classes. (875 F.2d at 1313, 1316; Appendix ("App.") 4a-5a.) The court added two gratuitous, injudicious slurs: (1) "there will always be at least one [agency fee challenger] . . .; the . . . Foundation will see to that, you can be sure" and (2) "the . . . Foundation [is] merely trying to hamstring the union." (875 F. 2d at 1315-16; App. 9a, 12a.)

No party attacked the Foundation during the litigation. The Court of Appeals made these determinations in the absence of a "case or controversy" and without jurisdiction over, notice to, or an opportunity to be heard by the Foundation. The Court of Appeals denied the Foundation the most rudimentary elements of due process.

The Foundation is a charitable legal-aid organization, *National Right to Work Legal Defense and Educ. Found., Inc. v. United States*, 487 F. Supp. 801 (E.D.N.C. 1979), which promotes its cause through a bona fide litigation program, *International Union, UAW v. National Right to Work Legal Defense Found.*, 781 F.2d 928 (D.C. Cir. 1986). Foundation provided attorneys have handled, *inter alia*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) and *Hudson*.

The First Amendment right to use litigation as a vehicle for expression and petitioning for redress of grievances has been upheld in numerous contexts, *e.g.*, *Brotherhood of R.R. Trainmen v. Virginia*, 377 U.S. 1 (1964); *In re Primus*, 436 U.S. 412 (1978); *NAACP v. Button*, 371 U.S. 415 (1963); *see also UAW*, 781 F. 2d at 931. "[*A*]*s a matter of law*, [*it*] *cannot be deemed malicious*." *Button*, at 440 (emphasis added).

A party has a right to intervene after judgment if necessary "to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise." *United States v. Northern Sec. Co.*, 128 Fed. 808,

810 (C.C.S.D. Minn. 1904), *aff'd on other grounds*, 193 U.S. 197 (1904). Courts may be persuaded erroneously to give the Court of Appeals' opinion *res judicata* effect, thus unjustly damaging the Foundation's ability to provide legal aid to employees. *Holmes v. United States*, 231 F. Supp. 971 (N.D. Ga. 1964), *aff'd*, 353 F.2d 785 (5th Cir. 1965) (prior adjudications of competent courts may be so used). Indeed, opponents of other Foundation beneficiaries are already referring to the opinion in their briefs. (App. 57a-68a.)

This Court has granted petitions for intervention in order to present petitions for writs of certiorari, *e.g.*, *Banks v. Chicago Grain Trimmers Ass'n*, 389 U.S. 813 (1967); and has granted motions for leave to intervene in cases already before the Court, *e.g.*, *Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194, 198 n.5 (1944). As the intervenors in those cases, the Foundation now has a vital, concrete interest in the outcome of this litigation as it pertains to the Foundation.

For the foregoing reasons, the Foundation prays that its motion for leave to intervene be granted.

Respectfully submitted,

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QUESTIONS PRESENTED

The United States Court of Appeals for the Seventh Circuit has erroneously purported to exercise jurisdiction over petitioner, National Right to Work Legal Defense and Education Foundation, Inc., which is not a party to this action and which is not a legal representative of any party to the action, and has erroneously made determinations concerning the Foundation without any record and without any notice or opportunity for a hearing. The questions presented are, thus:

1. Does the Foundation, which was not a party to the action below, and is not a legal representative of any party, but has provided solely the financial backing for the appeal of this action, have standing to intervene and be granted a writ of certiorari in this Court to review that portion of the Court of Appeals' opinion pertaining to it, where none of the parties to the original action represents or is likely to protect the Foundation's interests?

2. Was it error under Article III, Section 2, Clause 1 of the United States Constitution for the Court of Appeals to render an opinion concerning the Foundation when the action below involved no case or controversy between the Foundation and any party?

3. Was the Foundation denied due process of law guaranteed by the Fifth Amendment to the Constitution when, without jurisdiction over, in the absence of a record concerning, and without notice to and an opportunity for a hearing on behalf of the Foundation, the Court of Appeals rendered an opinion adverse to the Foundation, damaging its reputation and First Amendment interests?

4. Was the Foundation's right under the First Amendment to the Constitution to associate and promote its cause through litigation—together with the

corresponding rights of its supporters, staff, attorneys, and the individual employees it assists—violated when the Court of Appeals attacked, defamed, and impugned the integrity of the Foundation for encouraging and assisting employees in the exercise of their constitutional right to limit governmentally coerced association with unions?

PARTIES BELOW

The parties in the Court of Appeals were plaintiff-appellant Jack Gilpin (now deceased);[1] defendant-appellee American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME"); and in their official capacities, defendants-appellees: Roland Burris, Comptroller of the State of Illinois; Richard McClure, Director of the Illinois Department of Central Management Services; Gregory L. Coler, Director of the Illinois Department of Public Aid; Edward Duffy, Director of the Illinois Department of Alcoholism and Substance Abuse; David W. Hardwick, Director of the Illinois Department of Veterans' Affairs; Larry Werries, Director of the Illinois Department of Agriculture; Brad Evilsizer, Director of the Illinois Department of Mines and Minerals; Gregory W. Baise, Director of the Illinois Department of Transportation; Bernard J. Turnock, Director of the Illinois Department of Public Health; Michael B. Witte, Director of the Illinois Department of Conservation; John E. Washburn, Director of the Illinois Department of Insurance; James B. Zagel, Director of the Illinois Department of Law Enforcement; J. Thomas Johnson, Director of the Illinois Department of Revenue; Michael Fryzel, Director of the Illinois Department of Financial Institutions; Mike Woelffer,

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[1] Although the caption in the Court of Appeals referred to "Jack Gilpin, et al.," only Jack Gilpin's name appeared in the Notice of Appeal. Thus, the only appellant below was Jack Gilpin. *Torres v. Oakland Scavenger Co.*, 487 U.S. ____, 108 S. Ct. 2405 (1988).

Director of the Illinois Department of Commerce and Community Affairs; Terry Lash, Director of the Illinois Department of Nuclear Safety; Michael Belletire, Director of the Illinois Department of Mental Health and Developmental Disabilities; Gary L. Clayton, Director of the Illinois Department of Registration and Education; Michael P. Lane, Director of the Illinois Department of Corrections; Gordon Johnson, Director of the Illinois Department of Children and Family Services; Janet Otwell, Director of the Illinois Department of Aging; Joyce E. Tucker, Director of the Illinois Department of Human Rights; Susan Suter, Director of the Illinois Department of Rehabilitation Services; Dr. Donald Etchison, Director of the Illinois Department of Energy and Natural Resources; Sally Ward, Director of the Illinois Department of Employment Security; and Richard Carlson, Director of the Illinois Environmental Protection Agency.

CORPORATE AFFILIATIONS

Petitioner, National Right to Work Legal Defense and Education Foundation, Inc., has no parent corporations, subsidiaries, or affiliates.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES BELOW ii

CORPORATE AFFILIATIONS iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES ix

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING INTERVENTION AND THE PETITION FOR A WRIT OF CERTIORARI 7

A. The Foundation has Standing to Intervene and Seek Review of the Decision of the Court of Appeals 7

1. The Foundation has Standing to Intervene 7

2. The Foundation is Entitled to Intervene 9

TABLE OF CONTENTS—CONTINUED

Page

B. The Court of Appeals Erroneously Assumed Jurisdiction over the Foundation in the Absence of any Case or Controversy between the Foundation and any Party 11

C. The Court of Appeals has Denied the Foundation Due Process of Law Guaranteed by the Fifth Amendment 15

D. The Foundation's First Amendment Right to Associate with its Supporters, Staff, Attorneys, and the Employees it Assists for the Promotion of its Cause has been Violated 17

CONCLUSION 26

APPENDIX

Opinion of the United States Court of Appeals for the Seventh Circuit (May 24, 1989) 1a

Order (and opinion) of the United States District Court for the Central District of Illinois (July 30, 1986) 13a

TABLE OF CONTENTS—CONTINUED

Page

Order (and opinion) of the United States District Court for the Central District of Illinois (June 29, 1987) 24a

Order (and opinion) of the United States District Court for the Central District of Illinois (June 14, 1988) 30a

Judgment of the United States Court of Appeals for the Seventh Circuit (May 24, 1989) 35a

Excerpts of Complaint in this action, C.A. No. 85-3479 . . . . . 36a

Motion to Maintain Class Action and for Certification of the Class, filed in this action 39a

Memorandum in Support of Plaintiff's Motion Motion [sic] to Maintain Class Action and Certification of Class, filed in this action 46a

Excerpts of Post-Hearing Memorandum of Respondents National Education Association, *et al.*, filed in *Christensen v. Round Lake Educ.*

TABLE OF CONTENTS—CONTINUED

Page

Ass'n, Ill. Educ. Lab. Rel. Bd., Case Nos. 89-FS-0002-C, *et al.* 57a

Excerpts of Petitioner's [Oregon Public Employes Union's] Reply Brief, filed in *Elvin, et al. v. Oregon Public Employes Union*, Oregon Court of Appeals, No. A50465 . . . . . 59a

Excerpts of Memorandum [of TCU] in Support of Motion to Dismiss or, in the Alternative, for Summary Judgment, filed in *Kidwell, et al. v. Transportation Communications International Union*, C.A. No. PN 85-3804 (U.S.D.C., D. Md.) 61a

Excerpts of Brief of Defendant . . . San Bernardino Teachers' Ass'n, filed in *Grunwald, et al., v. San Bernardino City Unified School District, et al.*, Nos. 88-6617 and 88-6619 (U.S.C.A., 9th Cir.) 62a

Excerpts of UAW's Memorandum Regarding Restitution and Class Certification, filed in *Cramer v. Matish*, C.A. No. K88-306CA9 (U.S.D.C., W.D. Mich.) 64a

TABLE OF CONTENTS—CONTINUED

Page

Excerpts of AFSCME Council 13's Brief in Opposition to Plaintiffs' Motion for Partial Summary Judgment, filed in *Hohe v. Casey*, C.A. No. 88-1348 (U.S.D.C., M.D. Pa.) 67a

Memorandum opinion entered in *Hohe v. Casey*, Jan. 19, 1989, C.A. No. 88-1348 (U.S.D.C., M.D. Pa.) 69a

TABLE OF AUTHORITIES

CASES *Page*

Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977) . . . . . *passim*

Aguirre v. Bustos, 89 F.R.D. 645 (D.N.M. 1981) 20

Babbitt v. United Farm Workers, 442 U.S. 289 (1979) 11-12

Baker v. Carr, 369 U.S. 186 (1962) 8-9

Banks v. Chicago Grain Trimmers Ass'n, *cert. granted*, 389 U.S. 813 (1967), *rev'd*, 390 U.S. 459 (1968) 10

Brotherhood of R.R. Trainmen v. Virginia, 377 U.S. 1 (1964) 22-23

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986) . . . . . *passim*

Communications Workers v. Beck, 487 U.S. __, 108 S. Ct. 2641 (1988) 5, 22

Damiano v. Matish, 644 F. Supp. 1058 (W.D. Mich. 1986) 16

Eastern-Central Motor Carriers Ass'n v. United States, 321 U.S. 194 (1944) 10

TABLE OF AUTHORITIES—CONTINUED

Page

Ellis v. BRAC, 466
U.S. 435 (1984) 5, 22

George v. Baltimore City
Public Schools, 117 F.R.D.
368 (D. Md. 1987) 16

Gibney v. Toledo Bd. of Educ.,
40 Ohio St. 3d 152 (1988) 13

Hammonds v. State, 49 Ala.
App. 211 (Ala. Crim. App. 1972) 24

Hohe v. Casey, C.A. No.
88-1348 (M.D. Pa. Jan. 19,
1989) (App. 69a) 16

Holmes v. United States,
231 F. Supp. 971 (N.D. Ga.
1964), *aff'd*, 353 F.2d
785 (5th Cir. 1965) 9, 10

Horton v. Goose Creek Indep.
School Dist., 690
F.2d 470 (5th Cir. 1982) 20

In re N.C. Trading, 586
F.2d 221 (C.C.P.A. 1978) 16

In re Primus, 436 U.S. 412 (1978) 24

TABLE OF AUTHORITIES—CONTINUED

Page

International Union, UAW v. National Right to Work Legal Defense Found., 590 F.2d 1139 (D.C. Cir. 1978), *further proceedings*, 584 F. Supp. 1219 (D.D.C. 1984), *aff'd*, 781 F.2d 928 (D.C. Cir. 1986) 9, 20-21, 24

Lowary v. Lexington Local Bd. of Educ., 854 F.2d 131 (6th Cir. 1988) 13

Matthews v. Eldridge, 424 U.S. 319 (1976) 15

Minnesota State Bd. for Community Colleges v. Knight, 465 U.S. 271 (1984) 5, 22

Morgan v. Laborers Pension Trust Fund, 81 F.R.D. 669 (N.D. Cal. 1979) 19

NAACP v. Button, 371 U.S. 415 (1963) . . . 23, 24-25

NLRB v. Acme Indus. Co., 384 U.S. 925 (1966) 10

National Right to Work Legal Defense and Educ. Found., Inc. v. United States, 487 F. Supp. 801 (E.D.N.C. 1979) 21-22

National Wildlife Fed'n v. Gorsuch, 744 F.2d 963 (3d Cir. 1984) 11

TABLE OF AUTHORITIES—CONTINUED

Page

Old Dominion Dairy Products, Inc. v. Secretary of Defense, 631 F.2d 953 (D.C. Cir. 1980) 16

Penn-Central Merger Cases, 389 U.S. 486 (1968) 11

Preiser v. Newkirk, 422 U.S. 395 (1975) 11

Rosado v. Wyman, 322 F. Supp. 1173 (E.D.N.Y. 1970), *aff'd*, 437 F.2d 619 (2d Cir. 1970), *aff'd*, 402 U.S. 991 (1971) 19-20

Schweiker v. McClure, 456 U.S. 188 (1982) 16

Stolz v. United Bhd. of Carpenters, 620 F. Supp. 396 (D. Nev. 1985), *further proceedings*, 655 F. Supp. 192 (D. Nev. 1987) 18-19, 20

Torres v. Oakland Scavenger Co., 487 U.S. ___, 108 S. Ct. 2405 (1988) iii

Twyman v. Rockville Hous. Auth., 99 F.R.D. 314 (D. Md. 1983) 20

United Airlines v. McDonald, 432 U.S. 385 (1977) 10

United Mine Workers, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) 24

United States v. Certain Parcels of Land, 40 F. Supp. 436 (D.C. Md. 1941) 15

TABLE OF AUTHORITIES—CONTINUED

Page

United States v. Northern Sec. Co., 128 Fed. 808 (C.C.S.D. Minn. 1904), *aff'd*, 193 U.S. 197 (1904) 9

Will v. United States, 389 U.S. 90 (1967) 7

CONSTITUTIONS

U.S. Const. art. III, § 2, cl. 1 . . . . . i, 2, 11

U.S. Const. amend. I . . . . . *passim*

U.S. Const. amend. V . . . . . *passim*

STATUTES AND RULES

Internal Revenue Code

26 U.S.C. § 501(c)(3) 21

Judicial Code

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 . . . . . 2, 3, 15

28 U.S.C. § 1331 3

28 U.S.C. § 1343 3

28 U.S.C. § 2101(c) 2

TABLE OF AUTHORITIES—CONTINUED

Page

28 U.S.C. § 2201 3

28 U.S.C. § 2202 3

Civil Rights Act

42 U.S.C. § 1983 3

Federal Rules of Civil Procedure

Rule 4 15

Rule 5 15

Rule 45 15

Rules of the Supreme Court of the United States

Rule 17.1(a) 7

Rule 17.1(c) 7

Rule 26 7

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Respondents.

PETITION FOR LEAVE TO INTERVENE AND PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The National Right to Work Legal Defense and Education Foundation, Inc., (the "Foundation") prays for leave to intervene and that a writ of certiorari be granted to review the judgment and opinion of the Court of

Appeals entered in *Gilpin v. American Federation of State, County and Municipal Employees* on May 24, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals entered on May 24, 1989, in *Gilpin v. AFSCME*, Appendix ("App.") 1a, is reported at 875 F.2d 1310. The District Court entered an opinion on July 30, 1986, 643 F. Supp. 733 (App. 13a), a second, unpublished opinion on June 29, 1987 (App. 24a), and a final, unpublished opinion on June 14, 1988 (App. 30a).

JURISDICTION

The judgment of the Court of Appeals was entered on May 24, 1989. This petition is filed within ninety days of that date. This Court has jurisdiction under 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves U.S. Const. art. III, § 2, cl. 1; U.S. Const. amends. I and V; and 28 U.S.C. § 1291, the pertinent parts of which are set forth below.

> **U.S. Const. art. III, § 2, cl. 1.** The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and . . .—to Controversies to which the United States shall be a Party;—to Controversies . . .—between a State and Citizens of another State;—between citizens of different States; . . . .

> **U.S. Const. amend. I.** Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. V. No person shall be . . . deprived of life, liberty, or property, without due process of law; . . . .

28 U.S.C. § 1291. The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ...

STATEMENT OF THE CASE

Jack Gilpin, appellant below, together with eight other nonunion employees, all of whom were employed by state and local agencies of Illinois, were subject to a collective bargaining agreement, entered into pursuant to Illinois law, requiring them to pay compulsory agency fees to respondent American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME") as a condition of employment. By law, AFSCME was required to certify the amount of such compulsory fees, and the State then deducted the fees from the employees' paychecks, remitting the amounts collected to AFSCME.

These nine nonunion employees brought suit in September 1985 to contest the collection of these compulsory fees.[2] (App. 36a.) Plaintiffs in the District Court were represented by attorney Lee K. Zelle and his law firm (Immel, Zelle, Ogren & McClain) of Springfield, Illinois. No Foundation attorney ever entered an appearance in the District Court proceedings.

On October 11, 1985, plaintiffs filed in the District Court a motion to maintain a class action and for certification of a class. (App. 39a.) Plaintiffs sought to serve as class representatives, with Mr. Zelle and his firm serving as legal representatives of the class. The motion was denied on October 18, 1985, in a bench ruling. The District Court was not convinced of the "need" for class

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[2]Jurisdiction in the District Court was based on 28 U.S.C. §§ 1331, 1343, 2201-02, and 42 U.S.C. § 1983.

certification because, *inter alia*, final injunctive relief would perhaps provide equivalent protection for everyone. Plaintiffs were granted leave to renew the motion at a later date, which they did on August 6, 1988.

On July 30, 1986, the District Court determined that the first "notice" concerning the fees, sent by AFSCME to employees in 1985, and the procedures AFSCME had established for employees to challenge the fees, were constitutionally defective under *Chicago Teachers Union, Local No. 1 v. Hudson*, 475 U.S. 292 (1986). (App. 13a.) The second notice, sent by AFSCME in 1986, was also found to be constitutionally defective by Order entered June 29, 1987. (App. 24a.) On June 14, 1988, the District Court ruled that a third version of the notice was constitutionally sufficient. The District Court then determined that there were no damages, denied restitution of fees for all years, denied certification of a class for the second time, and dismissed the case as moot. (App. 30a.) Gilpin appealed.

After Gilpin's notice of appeal was filed, Milton L. Chappell, a staff attorney with petitioner-Foundation, entered his appearance as counsel for Gilpin on appeal. The Foundation, not being a law firm, did not enter an appearance; however, the Foundation's name appeared *pro forma* as part of Mr. Chappell's office address. Mr. Chappell, and *not* the Foundation, was recorded on the Seventh Circuit docket as Gilpin's appellate counsel. Mr. Zelle also entered his appearance and that of his law firm (then Immel, Zelle, Ogren, McClain, Germeraad & Costello) at the Court of Appeals, but Mr. Chappell served as lead counsel.

The Foundation is a nonprofit, charitable organization which provides free legal assistance to employees who, as a consequence of their subjection to compulsory unionism arrangements, have suffered violations of their right to

work; freedoms of association, speech, and religion; rights to due process of law; and other fundamental liberties guaranteed by the Constitution and laws of the United States and of the several States. To this end, the Foundation has supported several major constitutional cases involving the right of employees to refrain from joining or supporting labor organizations.[3] In more than 350 cases pending in 30 States, the Foundation is currently aiding employees who are seeking to enforce their rights to limit forced association with a labor organization as a condition of their employment. Many of these cases involve the collection or use of union fees, ostensibly for collective bargaining purposes, from nonmembers employed in both the public and the private sectors.

On appeal, Gilpin raised four issues which the Court of Appeals said "merit discussion." They were whether the District Court: (1) should have certified the suit as a class action; (2) should have issued a preliminary injunction against collection of the 1985 fees; (3) should have ordered restitution of fees collected in 1985 and 1986; and (4) should have found the 1987 notice adequate. Gilpin also raised in his brief the issue whether at least nominal damages should have been awarded for the adjudicated constitutional violations.

Not being a party, the Foundation challenged nothing, sought no relief, and sought no remedy. Also, not being a law firm, the Foundation did not "represent" anyone.

Nonetheless, the Court of Appeals made numerous determinations as if the Foundation were both a party and Gilpin's counsel, to wit:

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[3]*E.g.*, *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Ellis v. BRAC*, 466 U.S. 435 (1984); *Minnesota State Bd. for Community Colleges v. Knight*, 465 U.S. 271 (1984); *Hudson*, 475 U.S. 292 (1986); and *Communications Workers v. Beck*, 487 U.S. ___, 108 S. Ct. 2641 (1988).

> . . . The "restitution" remedy *sought by the* National Right to Work Legal Defense *Foundation*, which *represents* the nine named plaintiffs, is consistent with—and only with—the aims of the first type of employee. The *Foundation* is *seeking* repayment to *all* the bargaining unit's nonunion employees of the *entire* agency fees collected by the union . . . , even though the *Foundation* has *not challenged* the arbitrator's determination . . . . Not only would the "restitution" that the *Foundation* seeks . . . . The National Right to Work *Foundation is not an adequate litigation representative* of those employees. Nor did *it* or anyone else propose that the judge certify two classes. . . . (875 F.2d at 1313; App. 4a-5a.) (Emphasis added in part.)

> . . . The arbitrator will order a refund to all union nonmembers who are overcharged, whether or not they file a challenge; so only one challenger is necessary. And there will always be at least one whether or not the notice is informative; the *National Right to Work Foundation will see to that, you can be sure.* (875 F.2d at 1315; App. 9a.) (Emphasis added.)

> . . . *In objecting* to the [1987] notice, the plaintiffs *and the* National Right to Work *Foundation* are merely trying to hamstring the union. (875 F.2d at 1316; App. 11a-12a.) (Emphasis added.)

These findings are totally imaginary and unsupported by the record, which shows the following: (1) the Foundation has never been a party to this action; (2) the Foundation has never sought restitution or any remedy in this action; (3) the Foundation has never represented the employees; (4) the Foundation, not being a State employee, has never had any right to challenge the arbitrator's determination (which was a separate, *extra*-judicial proceeding anyway); (5) the Foundation has never sought to be a legal representative of any member of a class in this action; (6) the Foundation has never objected to any notice involved in this action, including that for 1987, and not being a State employee had no right to object; (7) the

Foundation neither has been served with any process in this action, nor has sought to enter this action prior to filing the instant petition for leave to intervene; and (8) the record in this action, except for reflecting the Foundation's name as a *pro forma* part of Mr. Chappell's office address, is devoid of *any* reference to the Foundation.

REASONS FOR GRANTING INTERVENTION AND THE PETITION FOR A WRIT OF CERTIORARI

This is a paradigmatic case in which a Court of Appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 17.1(a). In particular, without a semblance of jurisdiction over the Foundation, the Court of Appeals has decided important questions of federal law involving the Foundation's First and Fifth Amendment rights in a way that conflicts with applicable decisions of this Court. Sup. Ct. R. 17.1(c). These usurpations of power and substantive errors warrant an exercise of this Court's discretion.[4]

A. THE FOUNDATION HAS STANDING TO INTERVENE AND SEEK REVIEW OF THE DECISION OF THE COURT OF APPEALS.

1. *The Foundation has Standing to Intervene.*

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[4]Alternatively, because of the Seventh Circuit's lack of jurisdiction over the Foundation, discussed *infra* Part C, a writ of mandamus or prohibition should issue. "The peremptory writ of mandamus has traditionally been used . . . 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction . . . .'" *Will v. United States*, 389 U.S. 90, 95 (1967) (citations omitted). See also Sup. Ct. R. 26.

To complain that the Foundation has been judicially "mugged in the dark" is no exaggeration. Its reputation has been sullied, its integrity has been impugned, and its ability to aid employees in the exercise of their First Amendment rights through litigation has been jeopardized by the Court of Appeals' decision—*without* the establishment of jurisdiction over, and *without* notice to and an opportunity for a hearing on behalf of, the Foundation.

Until the Foundation received a copy of the Court of Appeals' opinion, it was completely unaware that that court might be: (1) mistaking the Foundation for one of the parties; (2) mistaking the Foundation for one of the parties' attorneys; and (3) preparing to attack the Foundation's reputation and jeopardize its First-Amendment-protected litigation activities.

In spite of its obvious lack of jurisdiction over the Foundation, the nonexistence of a record concerning the Foundation, and the lack of any notice to the Foundation and opportunity for it to be heard *in propria persona*, the Court of Appeals nonetheless rendered numerous adverse and erroneous determinations with respect to the Foundation.

None of the parties to the original action represents the Foundation's interests, or is likely to protect those interests here.

Under these circumstances, the Foundation has standing to complain of the Court of Appeals' ruling. The test set forth in *Baker v. Carr*, 369 U.S. 186, 204 (1962) is:

> Have the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon

> which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.

In light of the Court of Appeals' injection into this case of imaginary issues concerning the Foundation, the Foundation has a vital, concrete interest in the outcome of this litigation as it pertains to the Foundation.

The Foundation asserts constitutional rights, not only on its own behalf, but also on behalf of its staff, attorneys engaged in carrying out its program, supporters, and those employees it assists. They all enjoy constitutional rights to associate and to use litigation as a vehicle for promoting First Amendment interests. The Foundation has successfully litigated this issue before, when the Foundation was a party and the matter was *sub judice* before courts with jurisdiction in the premises. *International Union, UAW v. National Right to Work Legal Defense Foundation*, 781 F.2d 928, 931 (D.C. Cir. 1986) (twelve-year case to establish that the Foundation is a *bona fide*, independent legal-aid organization). The Foundation should be permitted to defend its interests again here, now that they have been jeopardized by the Court of Appeals' gratuitous, *extra*-judicial attacks.[5]

2. *The Foundation is Entitled to Intervene.*

Intervention may be granted after entry of a final decree if necessary "to preserve some right which cannot otherwise be protected, or to avoid some complication that is liable to arise." *United States v. Northern Sec. Co.*, 128 Fed. 808, 810 (C.C.S.D. Minn. 1904), *aff'd on other grounds*, 193 U.S. 197 (1904). This petition is timely

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[5]Ironically, AFSCME, the union defendant in this case, was a losing plaintiff in *UAW*, *see* 590 F.2d 1139, 1144 n.5 (D.C. Cir. 1978), and thus bound by that decision. *Holmes v. United States*, 231 F. Supp. 971 (N.D. Ga. 1964), *aff'd*, 353 F.2d 785 (5th Cir. 1965).

inasmuch as it is being filed within the time limit for the existing parties to file a petition for a writ of certiorari. *See United Airlines v. McDonald*, 432 U.S. 385, 395-96 (1977).

In *Banks v. Chicago Grain Trimmers Association*, this Court granted a petition for intervention and for writ of certiorari, 389 U.S. 813 (1967), and decided the case on the merits, 390 U.S. 459 (1968). *Cf. Eastern-Central Motor Carriers Ass'n v. United States*, 321 U.S. 194, 198 n.5 (1944); *NLRB v. Acme Indus. Co.*, 384 U.S. 925 (1966) (intervention in cases already before this Court allowed to persons who had not been parties to the proceedings below, but who had a vital interest in the eventual resolution of the cases).

Failure to permit intervention by the Foundation would unjustly jeopardize the Foundation's ability to defend its reputation and to continue its legal-aid program. When a court of competent jurisdiction has entered a final judgment on the merits of a cause of action and the same parties or their privies are pursuing the same issues in a new proceeding, other courts are at liberty to take judicial notice of that prior adjudication and to cite it for *res judicata* effect. *Holmes*, 231 F. Supp. 971. The Foundation should not be exposed to the possibility that the Court of Appeals' decision will be used erroneously to that end. However, portions of that court's opinion maligning the Foundation have already been cited in a number of briefs filed in cases throughout the country, in which the Foundation is providing assistance, in an effort to confuse or prejudice courts and administrative agencies.[6] More such filings can be expected now that the decision is published in *Federal Reporter, Second*. Although the Foundation may be able to thwart such impropriety on a case by case basis, judicial economy and uniformity of

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[6]*See* excerpted examples, App. 57a-68a.

decision will best be achieved by the granting of this petition and disposition on the merits.

The Foundation is compelled to seek this Court's protection through intervention because, if an opportunity to intervene is ignored, it may be enough to bind a nonparty. *Penn-Central Merger Cases*, 389 U.S. 486, 505-06 (1968). *See also* authorities cited in *National Wildlife Fed'n v. Gorsuch*, 744 F.2d 963, 968-69 (3d Cir. 1984).

The Foundation has a personal and vital stake in the outcome of this case; imperative reasons exist for permitting the Foundation to intervene at this level; the Foundation's rights, as well as those of its supporters, staff, attorneys, and the employees it assists, have been jeopardized and cannot be safeguarded by the existing parties to the litigation; and this Court has in the past permitted intervention for such reasons in order to present a petition for writ of certiorari and to have it considered on its merits.

B. THE COURT OF APPEALS ERRONEOUSLY ASSUMED JURISDICTION OVER THE FOUNDATION IN THE ABSENCE OF ANY CASE OR CONTROVERSY BETWEEN THE FOUNDATION AND ANY PARTY.

The exercise of judicial power by the federal courts depends on the existence of a "case or controversy". U.S. Const. art. III, § 2, cl. 1; *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975). The test of whether there is a "case or controversy" which a federal court may adjudicate, or an "abstract question" which it may not, is whether conflicting contentions of the parties present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. *Babbitt v. United Farm Workers*, 442 U.S. 289, 298

(1979). These principles, which limit the jurisdiction of every federal court, have been violated by the Court of Appeals in this case.

The record is devoid of any claim or assertion against, or on behalf of, the Foundation, whether by pleading, motion, or otherwise. Thus, there was no claim or issue pending with respect to the Foundation over which the Court of Appeals had jurisdiction to render an opinion. Rather, the Court's determinations with respect to the Foundation sprang full-blown from the panel's own mind—clearly a violation of the case-or-controversy doctrine.

The opinion appears increasingly bizarre the more closely it is analyzed. As previously shown, the Court of Appeals made numerous adverse findings with respect to the Foundation, which were wholly without support in the record. *See supra* pp. 6-7.

In fact, however, it was the *employees* who sought a restitution remedy; it was *Mr. Zelle* and his firm who represented the employees in the District Court and, together with *Mr. Chappell*, represented Gilpin on appeal; it was the *employees* who sought repayment of agency fees to themselves and similarly situated employees; it was the *employees* who chose not to *participate* in an agency fee arbitration proceeding; it was *Mr. Zelle* and his firm who sought in the District Court to be litigation representative of the class; and it was the *employees* alone who had any right to, and did, object to the 1987 notice at issue. The Foundation was a stranger to all of these issues, and it properly did not seek to become a party to them. It merely provided Mr. Chappell's services on appeal, after final judgment had been rendered in the District Court.

In reality, this case was originally brought by nine employees of the State of Illinois seeking, *inter alia*,

declaratory and injunctive relief against the collection of agency fees by the State and AFSCME prior to having proper notice and objection procedures in accordance with court decisions antedating *Hudson*. After it was decided, *Hudson* itself was found to be controlling. Among the relief requested by the employees was restitution of amounts unlawfully deducted from their paychecks, relief that has been ordered in other cases by the United States Court of Appeals for the Sixth Circuit, *Lowary v. Lexington Local Bd. of Educ.*, 854 F.2d 131 (6th Cir. 1988), *further proceedings pending*, and the Supreme Court of Ohio, *Gibney v. Toledo Bd. of Educ.*, 40 Ohio St. 3d 152 (1988).[7]

In seeking court protection through their lawsuit, the employees were exercising rights guaranteed to them under *Abood* and *Hudson* for the protection of their substantive and procedural First Amendment rights not to associate with AFSCME under compulsion by the State of Illinois.

The employees also sought to maintain the suit as a class action with Mr. Zelle and his firm serving as class counsel. *See* Motion to Maintain Class Action and for Certification of the Class, together with supporting memorandum, filed on October 11, 1985. (App. 39a-56a.) The motion was denied on October 18, 1985. It was renewed unsuccessfully on August 6, 1986, and again denied in a written order entered on June 14, 1988. (App. 30a, 33a.)

Not one mention of the Foundation was made in those documents, in the defendants' responses, in oral argument, or in the District Court's decision for the simple reason that neither the Foundation nor any of its attorneys

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[7]The conflict in the circuits shown by *Lowary*, and with a State Supreme Court shown by *Gibney*, contrasted with the Court of Appeals' opinion in this case, would be an additional ground for review were Gilpin the petitioner here. This makes the Court of Appeals' vexation of the Foundation even more inexplicable.

was or sought to be the legal representative of the class. (There being no record with respect to the Foundation, none can be reproduced in the Appendix.)

No subsequent motion has ever been filed to substitute any Foundation attorney for Mr. Zelle and his firm should there be a reversal and the case be remanded to the District Court for certification of a class. In characterizing the Foundation as "not an adequate litigation representative" of certain employees, then, the Court of Appeals rendered a decision with respect to a fictitious issue, rather than a concrete issue presented by the parties.

To make the situation worse, the Foundation could *never* be the litigation representative of any party because it is not a law firm. It is a charitable, legal-aid organization which provides financial support for litigation, underwriting the work of outside attorneys and attorneys on its staff. It is those attorneys who would, upon proper motion in appropriate circumstances, seek to be the litigation representatives of a class. No such attorneys ever so moved in this action, and the Court of Appeals should not have made any peremptory, derogatory, anticipatory determinations *vis-a-vis* the Foundation.

By dragging the Foundation into its opinion without any case or controversy *vis-a-vis* the Foundation being presented by any party, the Court of Appeals exceeded its constitutional authority.

C. THE COURT OF APPEALS HAS DENIED THE FOUNDATION DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT.

The Court of Appeals compounded its errors by denying the Foundation even the most rudimentary elements of due process.

The Fifth Amendment provides, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The absolute fundamentals of "due process of law" are jurisdiction, adequate notice, and a fair hearing. *United States v. Certain Parcels of Land*, 40 F. Supp. 436 (D.C. Md. 1941); *cf. Hudson*. A fundamental requirement of due process is the opportunity to be heard at a meaningful time in a meaningful manner. *Matthews v. Eldridge*, 424 U.S. 319 (1976).

Although the Court of Appeals had jurisdiction to hear the appeal in this case under 28 U.S.C. § 1291, it lacked jurisdiction *over the Foundation* and thus lacked authority to make any determinations with respect to the Foundation. The Foundation was not a party to the litigation; nor did it seek to be. The Foundation was not the legal representative of any party; nor did it seek to be. No notice of any kind was ever served on or otherwise delivered to the Foundation alerting it to the fact that its interests might be affected, in any way, by the litigation. Neither the court nor any party ever notified the Foundation that it would be one of the subjects of the court's decision. No process was served on the Foundation pursuant to Fed. R. Civ. P. 4; no papers were ever served on it pursuant to Fed. R. Civ. P. 5; and no subpoena was ever served on the Foundation pursuant to Fed. R. Civ. P. 45. Obviously, the Foundation had no opportunity to be heard. Under these circumstances, the Court of Appeals had no lawful, constitutional basis to

treat the Foundation either as a party or as counsel for Gilpin.

The injury inflicted on the Foundation involves rights protected by the Fifth Amendment; the First Amendment right to petition the government for redress of grievances through access to the courts, *In re N.C. Trading*, 586 F.2d 221, 231-32 (C.C.P.A. 1978); and the right to protection of a corporation's good name, reputation, honor, and integrity, *Old Dominion Dairy Products, Inc. v. Secretary of Defense*, 631 F.2d 953 (D.C. Cir. 1980).

The Court of Appeals' opinion is also a direct attack on the Foundation's right to provide, and employees' right to receive, legal aid, especially when class actions are involved. This is contrary to other litigated decisions where attorneys supplied by the Foundation sought to represent members of a class and have been permitted to do so. *See, e.g., Damiano v. Matish*, 644 F. Supp. 1058 (W.D. Mich. 1986); *George v. Baltimore City Public Schools*, 117 F.R.D. 368 (D. Md. 1987) (full record developed of relationship of Foundation to attorneys and plaintiffs, and effect on class certification); and *Hohe v. Casey*, C.A. No. 88-1348 (M.D. Pa. Jan. 19, 1989) (an unreported decision, reproduced at App. 69a).

Furthermore, the Court of Appeals' opinion is apparently based on judicial bias, another violation of due process. *Schweiker v. McClure*, 456 U.S. 188, 195 (1982) ("due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities").

Without having jurisdiction, or giving notice and an opportunity to be heard, the Court of Appeals has publicly defamed the Foundation with an opinion crafted out of whole cloth, which damages the Foundation's good name, reputation, honor and integrity, and thus jeopardizes the

Foundation's ability to carry on its First-Amendment-protected legal-aid program. The opinion with respect to the Foundation should therefore be vacated, and vacated summarily.

D. THE FOUNDATION'S FIRST AMENDMENT RIGHT TO ASSOCIATE WITH ITS SUPPORTERS, STAFF, ATTORNEYS, AND THE EMPLOYEES IT ASSISTS FOR THE PROMOTION OF ITS CAUSE HAS BEEN VIOLATED.

Compounding the erroneous treatment of the Foundation as (1) a party and (2) a litigation representative, the Court of Appeals injudiciously added two gratuitous, prejudicial slurs attacking the Foundation's First-Amendment-protected legal-aid work and the constitutional rights it defends:

> . . . The arbitrator will order a refund to all union nonmembers who are overcharged, whether or not they file a challenge; so only one challenger is necessary. And there will always be at least one whether or not the notice is informative; the National Right to Work Foundation will see to that, you can be sure. (875 F.2d at 1315; App. 9a.)

> . . . In objecting to the [1987] notice, the plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union. (875 F.2d at 1316; App. 11a-12a.)

This derogatory characterization was highly improper, and is certain to have serious, totally unjustified repercussions for the Foundation's charitable, legal-aid work.[8] To understand the impropriety of these comments, it is necessary to place them in the context both of this case and of the Foundation's reason for being.

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[8] *See* examples of opinion's use, App. 57a-68a.

This case was brought to vindicate fundamental constitutional rights. In *Abood*, 431 U.S. at 237 & n.35, this Court decided that objecting nonmembers, who are required to pay union fees as a condition of employment, could not be compelled to pay more than their *pro rata* share of the union's collective-bargaining costs without violating those nonmembers' First Amendment rights of expression and association.

In *Hudson*, 475 S. Ct. at 305, 310, this Court held that "'the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure . . .' . . . [w]e hold today that the constitutional requirements for the Union's collection of agency fees include an adequate explanation of the basis for the fee. . . ." *Hudson* involved procedural challenges to the initial collection of agency fees without reference to later expenditures. "[R]espondents' [the nonunion employees'] challenge," this Court explained, "is to the procedure, not the expenditures . . . ." *Id.* at 304 n.13.[9]

The class action claim before the Court of Appeals was no justification for the panel's slur on the Foundation either. An analogous case, although *statutory* in nature, is *Stolz v. United Brotherhood of Carpenters*, 620 F. Supp. 396 (D. Nev. 1985). The complaint in *Stolz* alleged that the union violated the Labor Management Reporting and Disclosure Act (LMRDA) by the procedures used to "approve" a dues increase and checkoff proposal, and thus its collection of dues was illegal. The *Stolz* complaint also demanded full restitution and an injunction until proper procedures were in place. *Id.* at 398, 401, 406-07. The

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[9]This Court repeatedly emphasized the seriousness of the question before it: "The question presented in this case is whether the procedure used" is constitutionally valid. *Id.* at 302. "Procedural safeguards are necessary . . . ." *Id.* "In this case, we must determine whether the challenged . . . procedure survives First Amendment scrutiny . . . ." *Id.* at 304.

class sought in *Stolz* comprised all members of the union eligible to vote at the time the alleged violation occurred and all members who worked or were working under the contract that subjected them to the allegedly illegal dues checkoff. As did the unions herein, the defendant in *Stolz* opposed the class on the basis of inadequate representation because of antagonism between the named plaintiff and the class. *Id.* at 404-05. In certifying the class, the court stated:

> Initially, the gist of plaintiff's complaint . . . [was] that the manner in which the checkoff was approved . . . was improper, and violated his statutory rights. Therefore, even if a class member approves highly of the dues increase, he may still strongly disapprove of the fact that it was brought about in an illegal manner. In that all union members have a coextensive interest in seeing the provisions of the LMRDA enforced, plaintiff's attempt to enforce the provisions of this act can hardly be antagonistic to the interests of the rest of the class. . . .
>
> . . . .
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> In the present case, the possible difference of opinion regarding the necessity of the dues checkoff should not defeat the certification of the class. While it appears that some of the class members support the dues program, it is certain that the union will vigorously represent those interests at trial. Plaintiff will represent those class members who do object to the dues checkoff and the manner in which it was approved. In this sense, it cannot be said that any class antagonism will prevent all class interests from being represented adequately.

Id. at 405-06 (citations omitted); *cf. Morgan v. Laborers Pension Trust Fund*, 81 F.R.D. 669, 680 (N.D. Cal. 1979) (a party's speculation or conjecture that a conflict might exist, unsupported by reasoned analysis or underlying evidence does not preclude a finding that plaintiffs' representation is adequate); *Rosado v. Wyman*, 322 F. Supp. 1173, 1193-94 (E.D.N.Y. 1970), *aff'd on other grounds*, 437 F.2d 619 (2d Cir. 1970), *aff'd*, 402 U.S. 991

(1971) (the possibility that some class members will take a position different from class representatives does not preclude class action) (in both of these cases the class was certified and plaintiffs' counsel were staff attorneys from the Legal Aid Society and the Center on Social Welfare Policy and Law, respectively).[10]

Neither should the *Gilpin* restitution claim have provoked the Court of Appeals' attack on the Foundation. While the *Stolz* plaintiffs ultimately lost on the merits of their claim, 655 F. Supp. 192 (D. Nev. 1987), restitution of illegally collected dues has been ordered in various cases under the LMRDA, even though the dues were spent on the members' behalf. *See* cases collected in *Stolz*, 620 F. Supp. at 401. In this case, moreover, Gilpin's counsel was seeking restitution of fees collected in violation of *First Amendment* safeguards.

The fact that lead counsel on appeal, Milton Chappell, is employed by the Foundation is also irrelevant to the issues in this case. The Foundation's provision of legal assistance to appellant Gilpin is a First-Amendment-protected activity. *See UAW*, 590 F.2d at 1147-48. Although for more than a decade, in past litigation, twelve large unions were given repeated and substantial opportunities to uncover specific facts regarding their distorted view of the Foundation and its litigation program, in their attempt to stop it, they were unable to establish a single fact that "even remotely" proved their case. *UAW*, 781

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[10]Other cases certifying a class in which staff attorneys from legal aid organizations represented the named plaintiffs and the class include, *e.g.*, *Horton v. Goose Creek Indep. School Dist.*, 690 F.2d 470 (5th Cir. 1982) (ACLU); *Twyman v. Rockville Hous. Auth.*, 99 F.R.D. 314 (D. Md. 1983) (Legal Aid Bureau); and *Aguirre v. Bustos*, 89 F.R.D. 645 (D.N.M. 1981) (Southern New Mexico Legal Services).

F.2d at 935.[11] The courts have repeatedly held that the Foundation is a legitimate legal aid organization like the NAACP Legal Defense Foundation, the American Civil Liberties Union, and the Legal Aid Society—to mention a few.

The Foundation is a nonprofit, charitable organization formed in accordance with 26 U.S.C. § 501(c)(3) as a vehicle for people to associate in order to foster their principled beliefs, *inter alia*, that compulsory unionism as an institution gives rise to abuses and injustices visited upon employees, and those employees should be provided legal aid to correct those injustices. The pertinent parts of the Foundation's Articles of Incorporation are quoted in *National Right To Work Legal Defense and Education Foundation, Inc. v. United States*, 487 F. Supp. 801, 802-03 (E.D.N.C. 1979), a tax exemption case in which the Foundation's purposes and activities were directly at issue. In describing the work of the Foundation in that case, the District Court held:

> [A] reading of the pertinent cases reveals that the cou have rarely articulated a fundamental right with n sweeping eloquence and affection than they have the right to work. . . .
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> Like all fundamental rights, however, the right to work is not absolute, for it is subject to the limitations of compelling state interests. . . . For example, a compulsory union agreement can exist if permitted by federal and state statute; but the same arrangement cannot condition membership upon forced contributions going to political causes with which the contributor does not agree. . . . It is with this tension between the right to work and the

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[11]Since AFSCME, respondent here, was an actual party-plaintiff in *UAW*, *see supra* n.5, it would be estopped from attempting to relitigate matters already decided against it there. AFSCME did not even attempt to do so, however. The Seventh Circuit panel, *sua sponte*, handed AFSCME a belated, if unearned, victory.

> competing state interest the [Foundation's] litigation is primarily concerned. The sponsored litigation deals with those instances in which, in the judgment of the plaintiffs, a compulsory union arrangement oversteps the boundaries drawn by the right to work. Thus, the . . . conclusion that the right to work is not "an individual liberty involving a human dignity specifically guaranteed by the Constitution" is in error.
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> . . . .
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> The defense of each citizen's right to work under the First, Fifth, and Fourteenth Amendments is a noble objective. The public has a paramount interest in insuring that compulsory union arrangements do not unnecessarily impinge upon each worker's freedom of thought, association or speech. . . . Litigation is an appropriate vehicle for an organization to accomplish that objective. . . .

(Citations omitted.) *Id.* at 805-06, 807.

Notably, attorneys supplied by the Foundation handled the *Abood* case from the lowest level to this Court. Foundation attorneys also handled, *inter alia*, *Beck*, *Hudson*, *Ellis*, and *Knight*. As this Court knows, *Abood* and *Hudson* have been landmark cases defining the substantive and procedural constitutional limitations upon the extraction of union fees from nonmember employees in the public sector.

If the Court of Appeals' prejudicial reaction to the Foundation's provision of legal aid to nonunion employees is acceptable, then for the same reasons, blacks helped by the NAACP, consumers represented by Ralph Nader, individuals helped by the ACLU, and even employees helped by labor unions could all see their constitutional right to advance their causes jeopardized in future federal-court litigation. This Court, however, has made it clear that such a result would be unconstitutional. In *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 5-6, 7 (1964), this Court said:

> It cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them . . . , statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow.
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> . . . .
>
> . . . Laymen cannot be expected to know how to protect their rights when dealing with practiced and carefully counseled adversaries . . . , and for them to associate together to help one another to preserve and enforce rights granted them under federal laws cannot be condemned . . . . The right to petition the courts cannot be so handicapped.

Furthermore, "the exercise . . . of First Amendment rights to enforce constitutional rights through litigation, *as a matter of law, cannot be deemed malicious*." *NAACP v. Button*, 371 U.S. 415, 440 (1963) (emphasis added). That this principle applies to the Foundation, and is not restricted to the constitutional rights against racial discrimination, is clear by the concluding language of this Court, *Id.* at 444-45:

> . . . That the petitioner happens to be engaged in activities of expression and association on behalf of the rights of Negro children to equal opportunity is constitutionally irrelevant to the ground of our decision. . . . For the Constitution protects expression and association without regard to the race, creed, or political or religious affiliation of the members of the group which invokes its shield, or to the truth, popularity, or social utility of the ideas and beliefs which are offered.

The foregoing shows that the Court of Appeals' opinion is infused with constitutional considerations. First, plaintiffs and appellant raised First Amendment claims. Second, the Foundation, its contributors, and staff are

engaged in First-Amendment-protected activities when they support this type of litigation. Third, Milton Chappell is engaged in First Amendment activity when he chooses to associate with other attorneys and the Foundation for the purpose of representing these dissenting employees. *In re Primus*, 436 U.S. 412, 426 (1978); *Button*, 371 U.S. at 428-31; *see also UAW*, 590 F.2d at 1147-48; *United Mine Workers, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222-23 (1967). The panel's opinion constitutes a flagrant disregard of and attack upon all of these constitutional rights.

If an attorney attacked a party to a lawsuit with disparaging remarks such as those used by the Court of Appeals, the attack would be deemed prejudicial, the denial of a fair trial, and reversible error. *Hammonds v. State*, 49 Ala. App. 211 (Ala. Crim. App. 1972) (burglary conviction reversed because of prosecutor's extraneous, prejudicial statements; trial court, in addition, had properly instructed the jury to disregard a prejudicial reference to the NAACP). It is just as inappropriate and unprofessional for a court to make such comments.

Certainly, the Court of Appeals would not contend, as the State of Virginia and other segregationists did in regard to the NAACP in the 1950's and 1960's, that the NAACP was "evil" because its efforts to vindicate the constitutional rights of blacks thwarted the then politically dominant white community of Virginia, which favored denying those rights. This Court has said:

> . . . We cannot close our eyes to the fact that the militant Negro civil rights movement has engendered the intense resentment and opposition of the politically dominant white community of Virginia; litigation assisted by the NAACP has been bitterly fought.

> . . . The sheer mass of such . . . litigation is an indication of the intensity of the struggle. . . .
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> . . . .
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> . . . Lawsuits attacking racial discrimination, at least in Virginia, are neither very profitable nor very popular.

Button, 371 U.S. at 435 & n.16, 443.

Failure to vacate the Court of Appeals' judgment as it applies to the Foundation will allow litigation opponents of other Foundation beneficiaries to contend around the country that the Foundation is "evil" because of its efforts to vindicate the constitutional rights of nonunion employees. The Foundation and its attorneys should not bear the burden of having to address such allegations repeatedly and individually because of an opinion issued without jurisdiction, notice, or an opportunity for a hearing.

Is the Foundation now to be barred from promoting its cause, from informing employees of their rights and helping them to secure those rights? Are employees to be left without effective help so that forced, excess subsidization of politicians and causes favored by labor union officials, as a condition of public and private employment, can go unremedied? The Foundation submits not.

The Court of Appeals' decision, being in conflict with applicable decisions of this Court, should be vacated to the extent the panel erroneously purported to exercise jurisdiction over, and to make determinations with respect to, the Foundation.

CONCLUSION

For the foregoing reasons, the Foundation urges the Court to grant its petitions, to permit intervention and to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

In the United States Court Of Appeals For the Seventh Circuit

No. 88-2441
JACK GILPIN, *et al.*,

Plaintiffs-Appellants,
v.
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 85 C 3479—Richard Mills, Judge.

ARGUED JANUARY 17, 1989—DECIDED MAY 24, 1989

Before WOOD, JR., POSNER, and FLAUM, *Circuit Judges*.

POSNER, *Circuit Judge*. A union that has been certified as the exclusive bargaining representative for a group of employees must represent every employee in the bargaining unit, even those who don't belong to the union. Correlatively, the union is entitled to charge the nonmembers their pro rata share of the expenses that it incurs in negotiating for and administering the collective bargaining agreement, and to ask the employer to deduct this pro rata share from the nonmembers' wages. But if the union goes further and makes the nonmembers pay either the full union dues or an agency fee that exceeds the collective-bargaining costs fairly chargeable to

nonmembers, the union—and the employer—can get into legal trouble. If the collective bargaining agreement is with a *public* employer (state or local) that deducts the union's agency fee from its employees' wages, and part of the fee is used to advance the union's *political or ideological* goals as distinct from defraying the union's expenses of negotiating and administering the collective bargaining agreement, both the public employer and the union can be held liable in a suit under 42 U.S.C. § 1983 for violating the nonmembers' right of free speech under the First Amendment (made applicable to the states by interpretation of the Fourteenth Amendment). See *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977). What is more, the First Amendment has been held to require the public employer and the union to establish efficacious procedures, including notice and right to a hearing, for determining how much of the union's proposed agency fee is proper. See *Chicago Teachers Union v. Hudson*, 475 U.S. 292 (1986); *Ping v. National Education Ass'n*, 870 F.2d 1369 (7th Cir. 1989).

In September 1985 nine nonunion employees of Illinois state and local agencies brought this suit against the local of the American Federation of State, County, and Municipal Employees that represents those employees in collective bargaining, and against the employers themselves. Several weeks earlier, the union had decided that for the new school year the agency fee (called "fair share fee") would be 90 percent of the union dues, and the union had so notified the employees in the bargaining unit. Shortly after filing the suit the plaintiffs moved for a preliminary injunction to prevent the deduction of the agency fee for the 1985 school year. The motion was denied and the employers proceeded to deduct the fee from the wages of the nonunion employees in the bargaining unit and to pay over the amount deducted to the union, which however placed the entire amount in an interest-bearing escrow account. Although 10,000 of the 20,000 to 30,000 employees in the bargaining unit do not belong to the union, the district judge refused to certify the suit as a

class action.

After the Supreme Court decided *Hudson* in 1986, the district judge held that both the first notice sent by the union to employees regarding the "fair share fee" for the 1985 school year and the procedure that had been used to determine the fee were defective. For the 1986 school year the union sent a new notice after fixing the fee at 96 percent of the union's dues. It also asked the American Arbitration Association to appoint an arbitrator to determine the proper agency fee for both 1985 and 1986, as well as for future years. The arbitrator ruled that in 1985 the proper agency fee would have been 95 percent of union dues, so the nonmembers had gotten a bargain at 90 percent. He ruled that 95 percent was also the proper percentage for 1986, so the union had overcharged nonmembers by 1 percent that year. He directed the union to remit the 1 percent overcharge to the nonmembers from the escrow account together with the interest that had accrued in the account, and the union has agreed to do this. The nonmembers were not required to remit their 5 percent 1985 windfall. The plaintiffs in this suit were not parties to the arbitration proceeding and have not challenged the arbitrator's determinations regarding the proper agency fees for 1985 and 1986.

The district judge was dissatisfied with the 1986 notice but concluded that no harm had been done since the union had agreed to refund the overcharge to all nonmembers, whether or not they had challenged the 1986 agency fee. For the 1987 school year the union prepared a fuller notice, which the judge found adequately informative. The arbitrator has not yet ruled on the propriety of the fee that the union set for 1987 (at 91 percent of union dues), but the union has agreed to abide by whatever ruling the arbitrator makes and to refund any overcharge that he finds to all nonmembers whether or not they challenge the ruling. On the basis of the union's undertakings and the revision of the notice, the judge decided there was no need to order any relief, and he

entered judgment for the defendants.

The plaintiffs appeal, raising four issues that merit discussion: whether the judge should have certified the suit as a class action, given the large number of nonunion employees; whether he should have issued a preliminary injunction against the collection of the 1985 agency fee; whether the plaintiffs are entitled to restitution of the money deducted from their wages in 1985 and 1986, the years for which, the judge found, the union's notices were inadequate; and whether the 1987 notice was inadequate.

The district judge was right not to certify the suit as a class action on behalf of the 10,000 nonunion members. A potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately. See Fed. R. Civ. P. 23(a)(4); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1284 (7th Cir. 1985). Two distinct types of employee [sic] will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with—the aims of the first type of employee. The Foundation is seeking repayment to *all* the bargaining unit's nonunion employees of the *entire* agency fees collected by the union in the 1985 and 1986 school years (with interest), even though the Foundation has not challenged the arbitrator's determination that the union was entitled to *more* than the amount it actually collected in 1985 and to 99 percent of the amount it collected in 1986. Not only would the

"restitution" that the Foundation seeks confer a windfall on the nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy. The National Right to Work Foundation is not an adequate litigation representative of those employees. Nor did it or anyone else propose that the judge certify two classes. Finally, there is little—perhaps no legitimate—need for a class action here. The union's policy is to refund any overcharges determined by the arbitrator to all nonunion members, whether or not they are parties to a judicial or arbitral proceeding; and the nonunion members are not entitled to any additional monetary remedy, as we shall see.

We can be briefer about the second issue. The correctness of the order denying the preliminary injunction is thoroughly moot. The plaintiffs were trying to enjoin the deduction of agency fees for 1985. The judge refused and the fees were deducted. Even the United States Court of Appeals for the Seventh Circuit cannot make time run backwards.

We come to the third issue, restitution. At argument we pressed the plaintiffs' counsel for an explanation of how his clients could have been hurt by the inadequate notices sent in 1985 and 1986. The arbitrator—whose decision the plaintiffs have not challenged—found that the union had undercharged the plaintiffs for 1985, and the union has agreed to refund with interest the slight overcharge that it had exacted in 1986 though never enjoyed, having placed the entire agency fee in escrow. The plaintiffs actually *benefited* from the inadequate notice. The function of the notice is to give employees who don't belong to the union enough information about the agency fee for the forthcoming year to enable them to decide whether to challenge it. Had the plaintiffs received a fuller notice they might have mounted such a challenge.

But a challenge could only have cost them; it could not have benefited them. A challenge to the 1985 fee would have been worse than futile, given the arbitrator's finding that the fee was too low, while a challenge to the 1986 agency fee would have been futile because the arbitrator ordered the tiny overcharge in that fee refunded to all nonunion employees—even those who, like the plaintiffs, did not challenge the fee, whether because the notice was inadequate or for other reasons. The plaintiffs got something for nothing, thanks in part to the defective notices of which they complain.

The plaintiffs remind us that this is a First Amendment case, so that the principle that underlies the previous paragraph—the principle that denials of due process that do no measurable harm give rise to no damages, see, e.g., *Carey v. Piphus*, 435 U.S. 247 (1978)—may not apply. But the principle of *Carey* is not limited to due process cases. As the Supreme Court later explained in *Memphis Community School District v. Stachura*, 477 U.S. 299 (1986), whatever the constitutional provision that is violated, there can be no award of compensatory damages if there is no harm (i.e., no loss to compensate *for*). See also *Cygnar v. City of Chicago*, 865 F.2d 827, 848 n. 21 (1989); *Auster Oil & Gas, Inc. v. Stream*, 835 F.2d 597, 602 (5th Cir. 1988). What is true is that in areas where harm occurs but is not readily monetizable, an award of general damages may be permitted, and taking away a person's right of free speech may be such a case. See, e.g., *Memphis Community School District v. Stachura, supra*, 477 U.S. at 310-11; *City of Watseka v. Illinois Public Action Council*, 796 F.2d 1547, 1558-59 (7th Cir. 1986); *Ustrak v. Fairman*, 781 F.2d 573, 578-79 (7th Cir. 1986); *Parrish v. Johnson*, 800 F.2d 600, 606-07 (6th Cir. 1986). But it is still necessary to show some harm.

We can *imagine* an argument that these plaintiffs suffered harm. In 1986 their employers deducted a larger agency fee than was proper, and although the excess was placed in escrow and not used to fund the union's political

activities, the plaintiffs lost the use of the money, which they might have devoted to the support of political activities of their own choosing. Whether this is a sound argument, cf. *Lowary v. Lexington Local Board of Education*, 854 F.2d 131 (6th Cir. 1988), and what bearing the undercharge in 1985—which freed up funds for the plaintiffs to use on political activities if they chose, and which greatly exceeded the 1986 overcharge—should have on it, we need not consider. The plaintiffs allude to this argument in asking us to reverse the denial of their motion for a preliminary injunction but do not mention it in connection with their claim for monetary relief. Indeed, they do not seek damages. Instead they seek a remedy—restitution—that is ordinarily (although not invariably) a substitute for rather than a form of damages. See, e.g., *Patton v. Mid-Continent Systems, Inc.*, 841 F.2d 742, 748 (7th Cir. 1988); Dobbs, Handbook on the Law of Remedies 224 (1973) ("The damages recovery is to compensate the plaintiff, and it pays him, theoretically, for his losses. The restitution claim, on the other hand, is not aimed at compensating the plaintiff, but at forcing the defendant to disgorge benefits that it would be unjust for him to keep"). For example, a copyright holder who has suffered no damages can seek restitution of the infringer's profits in lieu of damages. See 17 U.S.C. § 504; see also 15 U.S.C. § 1117 (trademark infringement). But this avenue (restitution as the remedy for unjust enrichment) is closed to these plaintiffs, not only because the defendants derived no benefit from agency fees deposited in an escrow account but also because those fees did not exceed the union's bona fide expenses on behalf of the plaintiffs and the other nonunion employees. There was no enrichment, and it was not unjust.

The plaintiffs want the entire escrow account paid over to them and the other union nonmembers even though all of the money in it (with the exception of the 1 percent of the 1986 fee that the union has agreed to refund) is necessary—and inadequate—to defray costs properly incurred by the union in representing non-members in

collective bargaining, and even though the union derives no benefit from agency fees held in escrow. It is a severely punitive remedy the plaintiffs seek, not one properly described as restitution at all. It would be suitable if at all only if the defendants had been guilty of willful or malicious violations of the Constitution. Yet the 1985 notice which the district judge found to be defective had been issued before the Supreme Court decided the *Hudson* case, and the 1986 notice was ten pages long and contained voluminous information concerning the agency fee. The only defect the district judge found in the 1986 notice lay in the brevity of the union's description of the procedure for challenging the agency fee. The notice stated: "AFSCME Local 2000 has established an Arbitration Procedure for resolving challenges to the amount of the Fair Share Fee. This procedure will result in expeditious decision on the challenge by an impartial decision maker. Challengers will receive further information regarding this procedure upon the union's receipt of their challenge." The notice gave an address and deadline for mailing a written challenge that "must include the challenge fair share fee payer's ('Challenger's') name, address, social security number, job title, employer and employing agency and location." The district judge thought the notice should contain more details about the arbitration procedure. Maybe so, but this is a matter of judgment and the union can hardly be thought a willful violator of the First Amendment for having guessed differently. Since to file a challenge costs only a postage stamp plus a small amount of time to supply the tiny amount of information that the challenge must set forth, one would not have thought a challenger needed a detailed prospectus of the arbitration procedure before filing.

The 1987 notice contains the following substitute paragraph, approved by the district judge, for the one we quoted from the 1986 notice:

> AFSCME Local 200 has established an Arbitration Procedure for resolving challenges to the amount of

> the Fair Share Fee. This procedure will result in an expeditious decision on the challenge by an impartial decision maker. The decision maker will be an arbitrator selected by the American Arbitration Association. An arbitration proceeding will be conducted by the arbitrator pursuant to the rules of the American Arbitration Association governing fair share cases. AFSCME will have the burden of proving that the fair share fee is proper. Challengers will have a chance to appear before the arbitrator to state their objections to the fair share fee. The arbitrator will issue a decision regarding challenges to the amount of the fair share fee 30 days after submission of final arguments regarding the amount of the fee. Challengers will receive further information regarding this procedure upon the union's receipt of their challenge.

Is this an improvement? Is it the constitutional *minimum*, as the district court thought? It is more informative, but also longer and more complex. It may invite a few more challenges, but so what? The arbitrator will order a refund to all union nonmembers who are overcharged, whether or not they file a challenge; so only one challenger is necessary. And there will always be at least one whether or not the notice is informative; the National Right to Work Foundation will see to that, you can be sure.

The issue is not whether the provision regarding challenges in the 1986 notice was constitutionally inadequate—an issue no party has raised—but whether its inadequacy was so patent that the union should be punished by being deprived of millions of dollars ($6 million to be precise) to which it is otherwise lawfully entitled. We think not. The constitutional violation was a technical one at worst, and a punitive remedy is not

called for. What the plaintiffs call restitution we call punitive damages, and the Supreme Court has set forth standards for the award of punitive damages in civil rights cases that the plaintiffs have not attempted to satisfy. See *Smith v. Wade*, 461 U.S. 30 (1983); *Soderbeck v. Burnett County*, 752 F.2d 285, 289-91 (1985); *Walsh v. Mellas*, 837 F.2d 789, 801-02 (7th Cir. 1988); *Erwin v. County of Manitowoc*, Nos. 88-1211, 88-1263, slip op. at 13 (7th Cir. April 19, 1989).

Indeed, if we ordered the union to turn over the escrow account to the plaintiffs and the other nonunion employees, the *union* would have a strong claim for restitution. For the union negotiated on behalf of these employees as it was required by law to do, adjusted grievances for them as it was required by law to do, and incurred expenses in doing these things that exceeded the amount in the escrow account for 1985 and 1986. The plaintiffs do not propose to give back the benefits that the union's efforts bestowed on them. These benefits were rendered with a reasonable expectation of compensation founded on the collective bargaining agreement and federal labor law, and the conferral of the benefits on the plaintiffs would therefore give rise under conventional principles of restitution to a valid claim by the union for restitution if the union were forced to turn over the escrow account to the plaintiffs and others similarly situated to them. See, e.g., *Goldstick v. ICM Realty*, 788 F.2d 456, 467 (7th Cir. 1986); Palmer, The Law of Restitution §§ 1.2, 4 (1978 and Supp. I 1984); Dobbs, *supra*, at 232-35. In claiming restitution the plaintiffs are standing that remedy on its head. This is further proof that they are seeking punitive damages by another name without having satisfied the conditions for an award of punitive damages in a civil rights case.

The last issue is whether the 1987 notice provided sufficient information regarding not the procedures for challenging the agency fee but the allocation of union expenses between agency and other accounts. The plain-

tiffs complain that the breakdown is not detailed enough to enable them to determine whether a challenge to the agency fee is likely to succeed. Yet the notice breaks down the union's activities into 35 categories and indicates which ones the union considers activities wholly in support of its agency mission (e.g., adjusting grievances under the collective bargaining agreement), which it considers wholly unrelated to that mission (e.g., contributing to political campaigns), and which it considers a mixture of agency and other functions (e.g., publishing a union newsletter). The notice recites that the arbitrator has found that the union's allocation of expenses in accordance with this breakdown is proper, and offers a copy of his detailed ruling for $1.50. The notice contains another list of 35 items—not the 35 separate activities that the union engages in but the 35 different types of expenditures listed in its audited financial statement (salaries and benefits, depreciation, telephone, etc.)—and indicates what percentage of each is chargeable to union nonmembers as part of the agency fee.

The plaintiffs complain that despite its detail the notice does not explain the principles under which, say $16,788 out of a total of $17,445 for "Editorial Services" is chargeable to the agency fee portion of union dues. But if it did, the notice would be as long and complicated as an SEC prospectus. The notice indicates which activities the union considers to be wholly or partly in pursuit of its agency mission, and what percentage of each expenditure item is allocated to that mission. This should be enough information (in contrast to the notice held deficient in *Damiano v. Marsh*, 830 F.2d 1363 (6th Cir. 1987)) to allow the employee to decide whether there is any reason to mount a challenge. Cf. *Chicago Teachers Union v. Hudson, supra* 475 U.S. at 306-07. Since mounting a challenge is for all practical intents and purposes free and since only one challenger is necessary to obtain a refund for all nonunion employees, we cannot see the point in requiring the union to provide even more information than the district judge required. In objecting to the notice, the

plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union.

The appeal is dismissed insofar as it challenges the denial of the plaintiffs' motion for a preliminary injunction. Otherwise the judgment is affirmed. Costs in this court to the defendants.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

Jack GILPIN, et al., Plaintiffs,
v.
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, et al., Defendants.

No. 85-3479.

United States District Court,
C.D. Illinois,
Springfield Division.

July 30, 1986.

ORDER

MILLS, District Judge:

The parties offer cross motions for summary judgment. Fed.R.Civ.P. 56. The Court finds that liability rests with the Defendants who have denied the Plaintiffs their rights to procedural due process in violation of 42 U.S.C. § 1983. Jurisdiction is appropriately premised on 28 U.S.C. § 1331.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the Court must view the facts in the light most favorable to the party against whom summary judgment is entered and give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598, 1608, 26 L.Ed.2d 142 (1970). Cross motions for summary judgment require no less careful scrutiny of the factual allegations. *LaCourte Oreilles Band of Lake Superior Chippewa Indians v. Voigt*, 700 F.2d 341, 349 (7th Cir.1983). The Court's inquiry "unavoidably asks whether

reasonable jurors could find by a preponderance of the evidence that the Plaintiff is entitled to a verdict—'whether there is [evidence] upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the *onis* of proof is imposed.'" *Anderson v. Liberty Lobby, Inc.*, ___ U.S. ___, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986), (*quoting Improvement Co. v. Munson*, 14 Wall. 442, 448, 81 U.S. 442, 448, 81 U.S. 442, 20 L.Ed. 867 (1872) (emphasis in original).

The posture of this particular litigation facilitates adherence to these guidelines. The parties have hammered out an understanding of the facts by dent of hard labor.

The Plaintiffs are employees of the State of Illinois, specifically the Department of Public Aid. The employees of the Department of Public Aid are divided into at least two bargaining units for the purpose of administering a collective bargaining agreement entered into between the State of Illinois and Defendant American Federation of State, County, and Municipal Employees (AFSCME). Although none of the Plaintiffs are members of Defendant AFSCME, they have been assigned to one of two bargaining units: RC-62 or RC-63. As of August 30, 1985, there were 12,289 state employees assigned to these two bargaining units and approximately half of these employees were not members of Defendant AFSCME.

On February 10, 1984, Defendant AFSCME entered into an agreement with the Illinois Department of Central Management Services (CMS), an agency of the state that has statutory authority to negotiate and administer collective bargaining agreements. The February 10th agreement provided for the assessment and collection of

"fair share" contributions from state employees who were not members of AFSCME.[1]

"Fair share" assessments are fees deducted from the paychecks of non-union employees and paid to the union as a pro rata assessment of the costs of conducting collective bargaining activities from which the non-union employees necessarily benefit. The parties do not contest the constitutionality of "fair share" assessments, rather the Plaintiffs object to the procedure whereby the fees were collected.

After entering into the "fair share" agreement, CMS notified various state department managers by letter of the impending "fair share" assessments in late April and again in early July 1984. By August 30, 1985, a majority of the employees in bargaining units RC-62 and RC-63 became members of Defendant AFSCME. Thereupon Defendant AFSCME notified CMS of its intention to seek "fair share" deductions from all employees who were not members of

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[1]The relevant portion of the agreement provides:

> Pursuant to Section 3(g) of the Illinois Public Labor Relations Act effective July 1, 1984, the parties agree that in bargaining unites [sic] in which AFSCME has or attains majority union membership, or receives a majority decision by referendum as set forth below, subsequent to July 1, 1984, the following shall be applicable: Employees covered by this agreement who are not members of the Union or do not make application for membership within fifteen (15) days of employment, shall be required to pay, in lieu of dues, their proportionate share of the cost of the collective bargaining process, contract administration and the pursuance of matters affecting wages, hours and conditions of employment, but not to exceed the amount of dues uniformly required of members. The proportionate share payment, as certified by the Union pursuant to Section 6(e) of the Illinois Public Labor Relations Act, shall be deducted by the Comptroller from the earnings of the non-member employees and shall be remitted semi-monthly to the Union.
>
> Complaint Exhibit 1 at 1.

the union. Pursuant to the agreement entered into between AFSCME and CMS, AFSCME certified the "fair share" contribution to be 90% of regular union dues.

On September 6, 1985, CMS informed the various state agencies that deductions for "fair share" contributions would begin with the September 16 through 30 pay period. Between September 10 and September 30, 1985, members of Defendant AFSCME placed notices of the impending "fair share" assessments on bulletin boards throughout the state offices. (Exhibits affixed to Defendant AFSCME's reply to Plaintiffs' motion for a preliminary injunction.) The notices indicated that the "fair share" assessment would be "90% of local union dues paid by AFSCME members." They gave a brief explanation of the manner in which the percentage was determined. And they stated that the deductions would begin with the September 30, 1985, pay period. Both notices provided the following information regarding objections to and appeals from the "fair share" assessments:

> Non-members have the right to object to the amount of the "fair share" fee and may do so (1) through AFSCME's internal procedure; or (2) by filing an unfair labor practice charge with the Illinois Public Employee Labor Relations Board, 320 West Washington St., Suite 500, Springfield, Illinois;
>
> For further information:
> write: AFSCME Council 31, Attention Jackie Kinnamen, 201 North Wells St., # 1850, Chicago, Illinois 60606.

This suit was filed on September 27, 1986. The first pay period during which "fair share" assessments were deducted ended on September 30, 1986. Two days later, CMS sent a letter to all affected employees signed by Bureau of Personnel Manager Robert H. Tapscott which in substance tracked the notices posted by Defendant AFSCME. (Plaintiff's Exhibit 6). With respect to the opportunity to object and appeal the CMS letter provided:

> You have a right to challenge the amount of the fair share assessment levied by the union. You can obtain more information about how to challenge the assessment amount by writing: AFSCME, Attention Jackie Kinnamen, 201 North Wells St., Suite 1850, Chicago, Illinois 60606 . . . Should you have any further questions, you may contact the Bureau of Personnel, Division of Employee and Labor Relations, at (217) 782-8164.

The day following the appearance of the CMS letter, 31 non-union employees filed complaints with the Illinois State Labor Relations Board (SLRB).[2] One week later, the first paychecks subject to the "fair share" deductions were issued.

At the time the "fair share" deductions were assessed and the notices were promulgated, the Illinois State Labor Relations Board (SLRB) had established no specific rules or regulations for considering objections to the assessments. On October 22, 1985, the SLRB directed its counsel to draft such rules and regulations and to report back by November 20, 1985. On November 20, the SLRB assumed jurisdiction over the complaints lodged against the "fair share" assessments. Five days later, AFSCME established an escrow account for the "fair share" assessments paid by all non-union employees whose objections to the assessments were known to AFSCME. The SLRB issued a complaint on the consolidated charges on December 3, 1985. A hearing on that complaint has been postponed several times at the request of the complainants.

Although the objection and appeal procedure advertised in AFSCME's posted notices was, in fact, not yet available, Defendant AFSCME did have in place an internal union grievance procedure. Under this procedure,

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[2]The Court is informed that subsequent to the filing of this cause additional employees have filed complaints with the SLRB.

an objecting, non-union employee may file a written challenge with the union to be reviewed by the Executive Board of AFSCME Council 31. An objector may appeal the Executive Board's decision to a professional arbitrator chosen and compensated by agreement of the union *and* the objector. As a second internal union remedy, a non-union employee may file a challenge directly with the union local's International affiliate and obtain a hearing from a designated hearing officer. The record does not indicate the existence of, or the nature of, any appeal or review of the decision by the International's hearing officer.

Law

The Plaintiffs contend that this cause of action is controlled by the Supreme Court's decision in *Chicago Teachers Union, Local No. 1 v. Hudson*, ___U.S.___, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986). The Defendants respond (1) that this Court should observe the doctrine of abstension [sic]; (2) that they have afforded the Plaintiffs all the procedure due; (3) that any procedural defects have been or are being cured and thus mooted; and (4) that the procedural guidelines outlined in *Hudson* should only be applied prospectively. After a review of the materials submitted for consideration, the Court finds that the *Hudson* decision does control the resolution of this cause, that the procedure outlined therein was violated by the Defendants, and that a remedy should be fashioned.

The equitable doctrine whereby a federal court abstains from considering a complaint pending resolution of the same or similar claims by a state tribunal is applicable where the complainant has the option of choosing between a federal or state forum and where the resolution of unsettled questions of state law will end the controversy. *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); see also *Askew v. Hargrave*, 401 U.S. 476, 91 S.Ct. 856, 28 L.Ed.2d 196 (1971). Defendant AFSCME

apparently contends that if this Court were to abstain and thereby allow sufficient time for correction of any procedural flaws, the Plaintiff's cause of action would thereby be mooted. Such an abstension [sic] would not, however, vindicate those constitutional rights Plaintiffs were and continue to have been denied. See *Hudson*, 106 S.Ct. at 1075 n. 14.

The parties do not dispute that the deduction of "fair share" fees impinges on recognized liberty and property interests to which the strictures of the Fourteenth Amendment's due process clause apply. The parties' dispute lies in determining the precise nature of the procedures that are due. However, this dispute has been effectively resolved by the United States Supreme Court:

> We hold today that the constitutional requirements for the union's collection of agency fees include an adequate explanation of the basis for the fee, a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker, and an escrow for the amounts reasonably in dispute while such challenges are pending.

Hudson at 1078. The procedure which Defendant AFSCME instituted in the fall of 1985 fails both the notice and appeal criteria outlined by the Supreme Court.

I. The "notices" published by the Defendants fail the test of adequacy in three respects.

First, the notice must inform all interested parties of the rationale behind the calculation of the "fair share." "The union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as verification by an independent auditor." *Hudson* at 1076 n. 18 (Relatively large expenditures, the Supreme Court indicates, should be divided into their component parts so as to demonstrate

with specificity the nature of the expenditure). The notices to which the Plaintiffs object merely indicated the union's conclusion as to the appropriate percentage of its budget expended on negotiation and failed to give detailed figures verified by an independent audit.

The second inadequacy in the notice Defendants provided Plaintiffs lies in the failure to provide sufficiently specific information on the procedure for lodging an objection to the "fair share" assessment. The notices posted by Defendant AFSCME did inform potential objectors that two avenues of redress existed and provided addresses for the SLRB and AFSCME Council 31. The notices did not contain phone numbers for the respective offices and, more importantly, they did not explain the procedure for making an objection known. The Supreme Court has indicated that "the non-members 'burden' is simply the obligation to make his objections known." *Hudson* at 1076 n. 16. The notices posted by the Defendants, by their lack of information regarding the procedure for objection, imposed upon the Plaintiffs not only the burden of objecting but also the burden of discovering how to object. Adequate notice entails information sufficient for an individual, unsophisticated non-union employee to file a written objection without further investigation.

Adequate notice also implies timely notice. Although the timing of the notice provided to the Plaintiffs in *Hudson* was not at issue before the Supreme Court, this Court finds that adequate notice requires notification a sufficient time prior to the deprivation so as not to present the deprived party with a *fait accompli*. In the present situation, although Defendant AFSCME notified the Department of Central Management Services of its intention to collect "fair share" assessments on August 30, 1985, neither the union nor the state made any attempt to notify the Defendants until September 10, 1985 (at the earliest), five days prior to the commencement of the first pay period during which "fair share" fees were to be

assessed. Without establishing an arbitrary period of time, the Court finds that the period of time necessary to establish the mechanics for deduction of the "fair share" fees is adequate for providing notice to any potential objectors. Once the union informs management of its desire to assess "fair share" fees in a specified amount, those against whom the fees will be assessed should also be notified of their right to object.

II. In addition to notice of their right to object, employees subject to "fair share" assessments are also entitled to "a reasonably prompt decision by an impartial decisionmaker." *Hudson* at 1076. The notices posted by the Defendants and the additional information available to objectors who write the union indicate three alternative avenues of appeal. An objecting non-union employee may file a charge with the State Labor Relations Board, or he may file an objection with AFSCME Council 31, or he may file an objection with the AFSCME International. *Hudson* requires only that the available procedure afford an objector "to have his objections addressed in an expeditious, fair, and objective manner." *Hudson* at 1076; see also *Id.* at 1076 n. 19.

None of the procedures available to the Plaintiffs here satisfy the minimum requirements of *Hudson*. The mechanism for mounting a challenge through the State Labor Relations Board, while potentially adequate, was essentially non-existent at the time the Defendants began deducting "fair share" fees. The appeal process through the AFSCME International fails for its use of hearing officers employed and therefore controlled by the union. *Hudson* at 1077. The appeal process through the union local has the distinct advantage of permitting both the objector and the union to select a mutually agreed upon arbitrator; however, an objector obtains arbitration of his claim only after review of his complaint by the local's Executive Board and thus falls short of the expeditious, fair and objective standard. None of the opposed methods of appeal provide "a reasonably prompt opportunity to

challenge the amount of the fee before an impartial decisionmaker." *Hudson* at 1078.

III. The union does appear to have satisfied the third major requirement of a valid "fair share" fee system by having established "an escrow account for the amounts reasonably in dispute while such challenges are pending." *Id.* at 1078. However, the *ex post* establishment of an escrow does not cure the procedural defects with respect to notice and appeal.

Contrary to the Defendants contentions, the Court finds that the constitutional strictures against which the Defendants' procedures have been measured were sufficiently established at the time the Defendants implemented their "fair share" assessments to require Defendants to adhere to them. The 7th Circuit's opinion in *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187 (7th Cir.1984), had been handed down prior to the implementation of the "fair share" deductions challenged here. While much of the Seventh Circuit's opinion was advisory in nature, it did provide some guidance which the Defendants chose to abjure. Moreover, in *Hudson*, the Supreme Court specifically directed that the district court retroactively fashion a remedy in accordance with its elucidation of the procedures that were due.[3]

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[3]While the Court finds that the procedural requirements for the deduction of "fair share" fees were sufficiently established to justify retroactive application of the remedy to be fashioned, the Court's finding should not be construed as a determination that the legal standards were so clear as to justify the assessment of damages against the state officers who are Defendants here. The Court has previously ruled that the law with respect to "fair share" deductions was not so clear as to pierce the special immunity afforded our public decision-makers.

Remedy

Having found that the Plaintiffs rights were, indeed, violated, the Court now, of necessity, considers the question of an appropriate remedy. In fashioning the appropriate remedy, the Court turns to those officers who have thus far served the Court well during the pendency of this cause. The remedy shall include injunctive relief as well as damages and fees to the extent warranted. Its details should, in the first instance, be proposed by the parties who, in the nature of things, best understand the practical considerations of implementation. Its scope should be sufficiently broad to provide for all those who have been subject to procedures which essentially, if not intentionally, were unfair.

To this end, the Plaintiffs are directed to file a memorandum with a proposed remedy and Defendants shall respond. The Court will then convene a hearing to be attended by all parties—at which the precise details of the remedy will be determined.

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS --
SPRINGFIELD DIVISION

JACK GILPIN, et al.,	)	No. 85-3479
	)	
Plaintiffs,	)	FILED
	)	JUN 29 1987
v.	)	JOHN M. WATERS,
	)	Clerk
	)	U.S. DISTRICT
AMERICAN FEDERATION	)	COURT
OF STATE, COUNTY AND	)	CENTRAL DISTRICT
MUNICIPAL EMPLOYEES,	)	OF ILLINOIS
et al.,	)	
	)	
Defendants.	)	

ORDER

MILLS, District Judge:

The American Federation of State, County and Municipal Employees (AFSCME) has moved to reconsider the Court's order of June 30, 1986, holding in favor of Plaintiffs and against the Defendants on the issue of their liability under 42 U.S.C. §1983. Pursuant to that order, the parties have submitted proposals concerning the appropriate remedy. In addition, updating briefs have recently been filed concerning AFSCME's attempted compliance with the June 30 order and the dictates of *Chicago Teachers Union v. Hudson*, 106 S. Ct. 1066 (1986). We now: (1) deny AFSCME's motion to reconsider; and (2) direct AFSCME to submit an amended draft of the proposed notice to all fair share fee payors.

The facts of this case are not disputed and are summarized in the Court's previous order. In that order,

we concluded that AFSCME's procedure for entertaining objections to the union's collection of the "fair share" fee prior to *Hudson* was defective because: (1) it did not adequately notify the payors of their right to object; and (2) the appeals process did not provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." Order of July 30, 1986, at p. 2.

AFSCME's motion to reconsider is premised upon the issue of mootness: it contends that after the *Hudson* decision, AFSCME voluntarily and fully implemented a system of procedures consistent with that case. It also maintains that the named plaintiffs have not suffered monetary damage as a result of any previous constitutional violation, thus mooting this case *in toto*. To buttress its conclusion, AFSCME has submitted memoranda outlining the steps it has taken to comply with our order and *Hudson*, as well as a nine-page document entitled "Notice to All Nonmember Fair Share Fee Payors" which it submits, satisfies the *Hudson* dictates for notice.

Plaintiffs' response points to a number of deficiencies in what they term "AFSCME's new and improved" procedures. Their primary objections, however, focus solely on the *Hudson* notice requirement. They no longer dispute that the AFSCME appeals process in fact affords prompt review before an impartial decisionmaker; Plaintiffs also concede that the *timing* of the notice provides the payors with enough time to object. Still, they claim that the substance of the notice provided does not give fair share fee payors enough information to knowingly take advantage of those procedures.

Although AFSCME appears to have undertaken a good faith effort to bring its procedures in line with *Hudson*, the notice given to fair share payors continues to fall short of the constitutional minimum. This order will therefore direct AFSCME to submit an amended draft of its proposed notice. In particular, the Court finds that

Plaintiffs' arguments with respect to notice of the procedures that will be followed *after an employee lodges his or her challenge* are well taken.

Currently, AFSCME's notice of the procedure for lodging a challenge states:

> AFSCME LOCAL 2000 PROCEDURE FOR CHALLENGING THE AMOUNT OF THE FAIR SHARE FEE
>
> AFSCME Local 2000 has established the following procedures for individual fair share payors who wish to challenge the foregoing calculation and the amount of the AFSCME fair share fee. PLEASE READ THIS PROCEDURE CAREFULLY. YOU MUST COMPLY WITH THESE PROCEDURES IN ORDER TO CHALLENGING [sic] THE AFSCME LOCAL 2000 FAIR SHARE FEE.
>
> Challenges
>
> Fair share fee payers must inform AFSCME Local 2000 of their challenge to the amount of the fair share fee in writing by mail. The written challenge must include the challenge fair share fee payer's ("Challenger's") name, address, social security number, job title, employer and employing agency and work location.
>
> The written challenge must be received by AFSCME Local 2000 at the following address and post-marked no later than May 31, 1986.
>
> AFSCME Local 2000
> 343 South Dearborn, Suite 1709
> Chicago, Illinois 60604
>
> B. AFSCME Local 2000 Arbitration Procedure
>
> AFSCME Local 2000 has established an Arbitration Procedure for resolving challenges to the amount of the Fair Share Fee. This procedure will result in expeditious decision on the challenge by an impartial decision maker. Challengers will receive further information regarding this procedure upon the union's receipt of their challenge.

Although this notice gives an employee enough information to *start* the procedure, it does not explain the process once the initial challenge is lodged. As this tribunal interprets *Hudson*, more detailed notice of the arbitration procedure itself is necessary to provide the nonunion employee with the information he needs to decide whether or not to object, and "to [thus] minimize the risk that nonunion employee contributions might be used for impermissible purposes . . ." *Hudson*, 106 S. Ct. at 1077. Similar to the disclosure of financial figures, leaving the nonunion employee completely in the dark about the arbitration procedure—and requiring them to object in order to receive information—does not adequately educate the employees about their procedural options. For example, proper notice should at least state that arbitration will ensue in accordance with the rules of the American Arbitration Association and that a copy of such rules are available well in advance of the deadline for filing an objection. This kind of notice entails a minimum of expense to the union, and decreases the risk that a nonunion employee would unknowingly bypass his right to object.

We therefore direct the Defendants to submit a further draft of the "procedural notice" section of its notice.

Plaintiffs also challenge the adequacy of the list of AFSCME expenditures contained in the notice. In *Hudson*, the Court held that the First Amendment demands that "potential objectors be given sufficient information to gauge the propriety of the union's fee." 106 S. Ct. at 1076. Plaintiffs maintain that AFSCME's list is defective because 35 types of AFSCME activities are grouped separately, and because there is no one-to-one relationship between those 35 activities and the list of expenses that follow. With this conclusion, the Court cannot agree.

Hudson itself noted that practical considerations render it impossible to expect "absolute precision" in the calculation of the charge to nonmembers:

> The union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, as well as a verification by an independent auditor.

106 S. Ct. at 1076 n. 18.

Despite Plaintiffs' protests, AFSCME's notice meets these essential requirements. It first sets forth two separate lists of expenditures, one for the national union, and one for AFSCME Local 2000. Next, the notice states the amount of expenditure in each category considered chargeable to nonmembers in calculating the amount of the fee. It then details those activities which are funded with the use of fair share fees and those which are not. Finally, each of the categories of expenses are verified by an independent auditor. We conclude that this information satisfactorily outlines the major categories of expenses charged to nonunion employees, and provides a sufficient basis for the employee to determine whether to mount a challenge to the fair share assessment.

Nevertheless, because AFSCME's "procedural notice" remains inadequate, this case is not yet moot. *Ergo*, the motion to reconsider is DENIED. AFSCME is ordered to submit a proposed amendment to its notice within 30 days. Moreover, as a necessary consequence of our holding that the procedural notice remains defective, previously non-objecting employees must be afforded another opportunity to object to the deduction of their share.

ENTER: June 29, 1987.

FOR THE COURT:

Richard Mills
RICHARD MILLS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS --
SPRINGFIELD DIVISION

JACK GILPIN, et al.,	)	No. 85-3479
	)	
Plaintiffs,	)	FILED
	)	JUN 14 1988
v.	)	JOHN M. WATERS,
	)	Clerk
AMERICAN FEDERATION	)	U.S. DISTRICT
OF STATE, COUNTY, AND	)	COURT
MUNICIPAL EMPLOYEES,	)	CENTRAL DISTRICT
AFL-CIO, et al.,	)	OF ILLINOIS
	)	
Defendants.	)	

ORDER

MILLS, District Judge:

This case is before the Court following the issuance of a rule to show cause why this action should not be dismissed and a final judgment entered.

This rule followed two orders in which the Court held that AFSCME's procedure for entertaining objections to the union's collection of "fair share" fees was defective under the dictates of *Chicago Teachers Union, Local No. 1 v. Hudson*, 106 S. Ct. 1066 (1986).

The first order issued following the filing of cross motions for summary judgment. We ruled in favor of Plaintiffs and against Defendants and ordered both parties to fashion a remedy. Part of Defendants' submission on the remedy phase was a "motion to reconsider" the order granting Plaintiffs' motion for summary judgment.

The basis for granting Plaintiffs' initial motion was our finding that the notice to fair share fee payers was defective because: (1) it did not adequately notify the payers of their right to object; and (2) the appeals process did not provide "a reasonably prompt opportunity to challenge the amount of the fee before an impartial decisionmaker." Order of July 30, 1986, p. 2.

AFSCME's "motion to reconsider" included a memorandum outlining their compliance with our order and the dictates of *Hudson*.

We found that the new notice provision was still defective with respect to the notice of the procedures that will be followed after an employee lodges his or her challenges. In all other respects, we held that the new notice complied with *Hudson* and the order of this Court. We ordered AFSCME to submit a proposed amendment to its notice in thirty days.

After receipt of the proposed amendment, we held that the new proposal fully complied with *Hudson* and the order of this Court. We also agreed with AFSCME's contention that Plaintiffs had not been prejudiced by the defect in the initial notice because AFSCME placed 100% of the fees collected to date in an interest bearing escrow account. Therefore, AFSCME never had use of the fees collected from Plaintiffs.

We have not changed our position regarding those conclusions made in the August 6, 1987, order. However, we do find that further comment is necessary to clarify the procedural posture of this case.

The confusion seems to have begun following the granting of Plaintiffs' motion for summary judgment. At that time, we ordered the parties to submit an appropriate remedy.

AFSCME did not submit a "proposed remedy", but instead filed the motion to reconsider referred to above. Technically, the motion to reconsider was improperly labeled as such.

First, there is no such creature as a "motion to reconsider" under the federal rules. Post-judgment relief is limited to situations discussed by Rules 59 and 60. *F/H Industries, Inc. v. National Union Fire Ins. Co.*, 116 F.R.D. 224, 225 (N.D. Ill. 1987). Second, the proposed notice which was subject to the June 29, 1987, order was submitted in response to an order of this Court that a remedy be fashioned by the parties. We construed AFSCME's motion to reconsider as being a response to our order to submit a remedy.

Hence, Plaintiffs' suggestion that the new notice is not properly before the Court is incorrect. It was before the Court prior to the June 29 order and once again before the Court prior to the August 6 order.

Nevertheless, whether labeled as a motion to reconsider or a proposed remedy, two questions were before the Court: (1) Did the new procedural notice comply with the *Hudson* guidelines? (2) Were Plaintiffs entitled to damages as a result of the previous defective notices?

Upon the proposal before the Court on the June 29 order, we answered the first question in the negative and therefore did not reach the issue of damages. As to the first question, we did note that AFSCME had cured a portion of the defective notice but that it was still defective in one aspect—procedures to be followed after the employee lodges the challenge.

However, upon review of the new proposal filed thirty days after the June 29 order, we found that "[AFSCME] has fully complied with this Court's interpretation of the

procedures mandated by *Chicago Teachers Union v. Hudson*. Order of August 6, 1987, at p. 1.

We also held that Plaintiffs were not prejudiced by the defects in the initial notices because the fees collected to date had been held in a interest bearing escrow account. This is consistent with our holdings throughout the case. We *never* held that the procedure was defective with regard to the establishment of the escrow.

This in turn decides the issue of damages. Plaintiffs cannot be entitled to any rebate of their fees if AFSCME has never had the use of those fees.

Plaintiffs also argue that the pendency of a class certification motion prevents the Court from entering judgment on this case. We disagree. The pendency of the class certification motion does not keep this case alive. First of all, this is not the first time a class certification motion has been pending before the Court in this case. We initially denied the request to certify a class at a hearing held on October 18, 1985. We stated our reasons on the record. We, however, stated that we would not preclude a renewed motion for class certification sometime later in the litigation. Nevertheless, we are in essential agreement with the reasoning stated in our prior denial.

Second, even in the event that the Court has changed its position, any renewal of the motion is most likely untimely filed. Because injunctive relief is no longer at issue, certification at this stage would have to contemplate the certification of a b(3) class. And a b(3) class cannot be certified once a case has been decided on the merits. *Hudson v. Chicago Teachers Union Local No. 1*, 117 F.R.D. 413, 415 (N.D. Ill. 1987), *on remand*, 106 S. Ct. 1066 (1986). Thus, for these reasons, we deny the motion to certify the class.

Finally, we agree with the Defendants' conclusion that the case is now moot. Of course, we recognize that

"voluntary cessation of illegal activity does not moot a case." *Hudson*, 106 S. Ct. at 1075 n. 14.

However, the cessation of illegal activity in this case was hardly voluntary. Rather, it was done at the insistence of this Court. Hence, any recurring violation would be done at the risk of invoking the contempt power of this Court.

Ergo, we find that this case is DISMISSED as moot. Judgment entered for Defendants.[1]

Case CLOSED.

ENTER: June 13, 1988

FOR THE COURT:

Richard Milis
RICHARD MILLS
United States District Judge

[1]Although we entered judgment for Defendants at this point, based on mootness, we do not find that this is dispositive of the issue of who is a "prevailing party" for purposes of attorney's fees under 42 U.S.C. §1988. This must wait for another day.

JUDGMENT – ORAL ARGUMENT

United States Court of Appeals

For the Seventh Circuit
Chicago, Illinos 60604

May 24, 1989

Before

Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge

JACK GILPIN, et al., Plaintiffs-Appellants,	) Appeal from the United States District Court for the Central District of Illinois, Springfield Division.
No. 88-2441 vs.	
AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES, AFL-CIO, et al., Defendants-Appellees.	) No. 85-C-3479 RICHARD MILLS, Judge

This cause was heard on the record from the United States District Court for the Central District of Illinois, Springfield Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED IN PART, DISMISSED IN PART, with costs in this court to the defendants, in accordance with the opinion of this Court filed this date.

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JACK GILPIN, STEPHEN A. PETRILLI, JEROME A. DIETRICH, MARGARET E. DAILY, SANDRA S. COE, KAREN HIRSTEIN, RAY ANDERSON, GAIL MUELLER and SCOTT MAUCK Plaintiffs, v. AMERICAN FEDERATION OF STATE, COUNTY, and MUNICIPAL EMPLOYEES, AFL-CIO; . . . and ROLAND W. BURRIS, Comptroller of the State of Illinois, Defendants.	FILED SEP 27 1985 JOHN M. WATERS, Clerk, U.S. DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS 85-3479

COMPLAINT

Plaintiffs, by their attorneys, Immel, Zelle, Ogren & McClain, for their Complaint against Defednants state:

PRELIMINARY STATEMENT

1. This is an action brought by nine employees of the State of Illinois against Defendant AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL

EMPLOYEES, AFL-CIO, (hereafter "AFSCME"), Defendant ROLAND W. BURRIS, State Comptroller, and the 26 named State agencies, asking for injunctive and declaratory relief and monetary damages based upon claims that these Defendants, acting in concert, are depriving Plaintiffs of their rights protected by the First and Fourteenth Amendments to the United States Constitution and by Article I, Sec. 2 and Article IV, Sec. 1 of the Illinois Constitution.

. . . .

[25] COUNT VI

. . . .

[26] WHEREFORE, Plaintiffs pray that this Court:

A. Issue a declaratory judgment pursuant to 28 U.S.C. Sec. 2201 declaring that: Ill.Rev.Stat. Ch. 48, Sec. 1606(e) constitutes an illegal delegation of legislative authority in violation of Article IV, Section 1 of the Illinois Constitution.

B. Award costs of this suit and other and additional relief as the Court deems just and appropriate.

Respectfully submitted,

JACK GILPIN, STEPHEN A. PETRILLI, JEROME A. DIETRICH, MARGARET E. DAILY, SANDRA S. COE, KAREN HIRSTEIN, RAY ANDERSON, GAIL MUELLER and SCOTT MAUCK, Plaintiffs

By Lee K. Zelle
One of Their Attorneys

Lee K. Zelle
Immel, Zelle, Ogren & McClain
741 South Grand Ave., West
Springfield, IL 62704
Tel. 217/789-1414

(Exhibits omitted.)

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JACK GILPIN, STEPHEN A. PETRILLI, JEANNE A. DIETRICH, MARGARET E. DAILY, SANDRA S. COE, KAREN HIRSTEIN, RAY ANDERSON, GAIL MUELLER and SCOTT MAUCK Plaintiffs, v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, et al., Defendants.	FILED OCT 11 1985 JOHN M. WATERS, Clerk U.S. DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS 85-3479

MOTION TO MAINTAIN CLASS ACTION
AND FOR CERTIFICATION OF THE CLASS

Plaintiffs, JACK GILPIN, STEPHEN A. PETRILLI, JEANNE A. DIETRICH, MARGARET E. DAILY, SANDRA S. COE, KAREN HIRSTEIN, RAY ANDERSON, GAIL MUELLER and SCOTT MAUCK, by their attorneys, hereby move this Court, pursuant to Rule 23, Fed.R.Civ.P., for an Order determining that this cause should proceed as a class action and certifying that the persons set forth in Paragraph E below are members of the class, and for reasons therefor represent to the Court as follows:

A. Pursuant to Fed.R.Civ.P. 23(a):

(1) the class consists of over 6000 members and is, therefore, so numerous that joinder of all members would be impracticable;

(2) as established by the Complaint, there are questions of law and fact common to all members of the class;

(3) the claims of the representative party are typical of the claims of all members of the class; and

(4) the representative party will fairly and adequately represent the interests of all members of the class.

B. Pursuant to Fed.R.Civ.P. 23(b)(1)(A), the prosecution of separate actions by the individual members of the class would create a risk of inconsistent or varying adjudication with respect to individual members of the class which would establish incompatible standards of conduct for the defendants;

C. Pursuant to Fed.R.Civ.P. 23(b)(2), the Defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

D. Pursuant to Fed.R.Civ.P.23(b)(3), the questions of law and fact common to the members of the class predominate over any questions affecting only individual members and a class action is superior to other available methods of fair and efficient adjudication of the controversy.

E. The members of this class are those plaintiffs and all other persons who are now, have been, or will be employees of the State of Illinois and are subject to the involuntary proportionate share deduction procedures

contained in Agreements between Defendants AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES ("AFSCME") and Defendant CENTRAL MANAGEMENT SERVICES, and:

(a) Who are not members of the Defendant AFSCME but are represented in the collective bargaining process between their employer(s) and AFSCME by virtue of the fact that they have been assigned, without their consent, to bargaining units 62, 63, 6, 9, 14, 28, 42 and 69 or CU-500 (see attached Affidavit of John J. Hartnett); and

(b) Who have had money withheld from their salary without their consent by Defendants, or who have been threatened by either AFSCME or Defendants, through their agents, that money will be withheld from their salary without their consent; and

(c) Whose withheld money, or threatened to be withheld money, has been or will be transferred to AFSCME by Defendants, pursuant to the collective bargaining agreement between AFSCME and Defendants; and

(d) Whose rights to procedural due process, freedom of association and equal protection, as guaranteed under the First and Fourteenth Amendments to the United States Constitution have been violated by virtue of the fact that their property was taken without constitutionally adequate and proper notice, under State procedures that did not afford a constitutionally adequate hearing prior to the taking of their property and for whom no constitutionally adequate post-taking hearing process exists.

F. And for such other reasons as set forth in the memorandum of points and authorities attached to this Motion, which Plaintiffs hereby incorporate herein.

WHEREFORE, Plaintiffs respectfully move the Court for an Order that this cause be maintained as a class action and that the persons identified as being members of the class established in Paragraph E above be certified as the class.

Respectfully submitted,

Lee K. Zelle
One of Plaintiffs' Attorneys

Lee K. Zelle
Immel, Zelle, Ogren & McClain
741 South Grand Ave., West
Springfield, IL 62704
Tel. 217/789-1414

CERTIFICATE OF SERVICE

Lee K. Zelle, being one of Plaintiff's attorneys, certifies that copies of the foregoing document was served on the following attorneys of record by depositing same in the U.S. Mail, postage prepaid, on October 11, 1985.

Robert E. Wagner
Assistant Attorney General
500 South Second St.
Springfield, IL 62706

Gilbert A. Cornfield, Esq.
Cornfield and Feldman
343 South Dearborn,
13th Floor
Chicago, IL 60604-3852

Larry Weinberg, Esq.
Kirschner, Weinberg, Dempsey,
Walters & Willig
1100 17th Street, N.W., Suite 800
Washington, D.C. 20036

Lee K. Zelle

STATE OF ILLINOIS)
) SS
COUNTY OF SANGAMON)

AFFIDAVIT OF JOHN J. HARTNETT

John J. Hartnett ("Affiant"), being duly sworn, states as follows:

1. Affiant is employed as Supervisor of the Labor Relations Unit of the Bureau of Personnel, State of Illinois, Department of Central Management Services.

2. Affiant's duties and responsibilities in his above-stated employment include the negotiation and administration of all of the State of Illinois' collective bargaining agreements with various labor organizations.

3. There are sixteen (16) collective bargaining units of State of Illinois' employees which have been certified for the requirement of fair share payments pursuant to Sections 3(g) and 6(a) of the Public Labor Relations Act (Ill. Rev. Stat. ch. 48, par. 1603(g), 1606(a)) and the terms of the applicable collective bargaining agreements.

4. Pursuant to the terms of the applicable collective bargaining agreements, in order for a bargaining unit to attain certification for the requirement of fair share payments, the majority of employees in the bargaining unit (based upon the most recent payroll deduction records of employees eligible for dues deduction at the time of the certification process) must have voluntarily agreed to the payment of union dues.

5. The following sets forth the bargaining units which were certified for the requirement of fair share payments with data, maintained under affiant's direction and control, showing the number of employees eligible for dues deduction at the time of the certification process, the

number of those employees who voluntarily agreed to the payment of union dues, the date of fair share payment certification, and the date the fair share agreement with each union was signed by a duly authorized representative of the State and the respective union.

Bargaining Unit	Employees Eligible for Dues Deduction	Employees Paying Dues	Certification per audit survey of Comptroller's payroll deduction records	Date of Signature
RC 9	8,421	5,848	6-6-84	6-25-84
RC 6	4,719	3,511	6-6-84	6-25-84
RC 29	871	461	6-11-84	6-18-84
RC 33	144	89	6-11-84	6-18-84
RC 45	247	186	6-11-84	6-18-84
RC 42	536	300	6-20-84	7-25-84
HR 1	650	587	6-20-84	6-20-84
RC 19	2,045	1,385	6-20-84	6-20-84
RC 20	423	296	6-21-84	6-28-84
HR 12	75	43	6-27-84	6-27-84
HR 10	76	49	8-31-84	10-30-84
RC 28	1,895	978	9-4-84	9-14-84
RC 69	23	17	1-8-85	1-28-85
RC 23	1,276	753	7-25-85	8-22-85
RC 62	9,436	4,735	8-30-85	8-30-85
RC 63	2,853	1,450	8-30-85	8-30-85

Further affiant sayeth not.

John J. Hartnett
JOHN J. HARTNETT

Subscribed and sworn to
before me this 10th
day of October, 1985.

Debra A. Durako
NOTARY PUBLIC

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
SPRINGFIELD DIVISION

JACK GILPIN, STEPHEN A. PETRILLI, JEANNE A. DIETRICH, MARGARET E. DAILY, SANDRA S. COE, KAREN HIRSTEIN, RAY ANDERSON, GAIL MUELLER and SCOTT MAUCK Plaintiffs, v. AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, et al., Defendants.	FILED OCT 11 1985 JOHN M. WATERS, Clerk U.S. DISTRICT COURT CENTRAL DISTRICT OF ILLINOIS 85-3479

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION MOTION [sic] TO MAINTAIN CLASS ACTION AND CERTIFICATION OF CLASS

I. INTRODUCTION

The present action was initiated by Plaintiffs, JACK GILPIN, STEPHEN A. PETRILLI, JEANNE A. DIETRICH, MARGARET E. DAILY, SANDRA S. COE, KAREN HIRSTEIN, RAY ANDERSON, GAIL MUELLER and SCOTT MAUCK, seeking injunctive and other relief from the enforcement of provisions of collec-

tive bargaining agreements entered into between Defendants AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES ("AFSCME") and CENTRAL MANAGEMENT SERVICES, STATE OF ILLINOIS ("CMS") calling for involuntary proportionate share deductions from the salaries of Plaintiffs and other State of Illinois employees who are not members of Defendant AFSCME.

A. Plaintiffs and the Proposed Class

Plaintiffs are all employees of Defendant DEPARTMENT OF PUBLIC AID. They have been involuntarily assigned to two "bargaining units", RC-62 and RC-63, represented by AFSCME as the exclusive bargaining agent for the two units.

The proposed class includes all other State employees who are in bargaining units "represented" by AFSCME and who have been, are being or will be subjected to involuntary "proportionate share" deductions from their salaries in an amount equal to 90% of the dues paid by all members of the union. The class may be divided into two groups:

Group A: All non-union members of bargaining groups RC-62 and RC-63. Involuntary deductions from this group commenced with the pay period September 16-30, 1985. According to the Affidavit of John J. Hartnett, Supervisor of the Labor Relations Unit of the Bureau of Personnel in Defendant CMS (copy attached to Motion for Certification of Class) (hereafter "Hartnett Affidavit"), there are 6104 non-union members in this Group; and

Group B: All non-union members of bargaining units RC-6, 9, 14, 28, 44 and 69 and CU-500. Per the Hartnett Affidavit, members of RC-6, 9, 28, 44 and 69 are already subjected to involuntary deductions, some since July 1, 1984. The number of non-union members in these units at the time deductions begain [sic] was 4,930. In addition, members of RC-14 are subject to future deductions.

The Agreements

Defendants AFSCME and CMS (on behalf of all State Agencies having employees in the bargaining units) have entered into the following Agreements having proportionate share provisions:

1. Supplemental Agreement Between the State of Illinois and AFSCME, Fair Share, dated February 12, 1984. Plaintiffs' Exhibit 1.

2. Separate Bargaining Agreements for RC-62 and RC-63, dated December 12, 1984-June 30, 1986 (Exhibit 3), for RC-6, RC-9, RC-14, RC-28 and RC-42, February 10, 1984-June 30, 1986 (Exhibit 13) for RC-69, December 12, 1984-June 30, 1986 (Exhibit 18). The fair share provisions of the three contracts are identical (Ex. 3, p. 6-7; Ex. 13, p. 6-7; Ex. 20, p. 1 (adopts Ex. 3 provisions).

All of the Agreements described allow for involuntary proportionate share deductions after union membership in a given unit exceeds 50%. CMS agreed, on behalf of the employer Agencies, to deduct whatever amount or percentage the union "certifies" as non-union members' share of the cost of the collective bargaining process, contract administration and the pursuance of matters affecting wages, hours and conditions of employment.

For each applicable instance, AFSCME has certified involuntary deductions amounting to 90% of full union dues as the proportionate share.

The only possible statutory authority for this involuntary taking of employees' property is Section 6(e) of the Illinois Public Labor Relations Act (Ill. Rev. Stat., Ch. 48, Sec. 1606(e)), which authorized public employers to negotiate proportionate share deduction agreements.

Neither Section 6(e) nor the Agreements require the employer or the union to give affected employees advance, or for that matter, any, notice of the impending taking.

Neither Sec. 6(e) nor the Agreements create or require the establishment of any procedures to allow affected parties to challenge the involuntary taking prior to the deprivation.

Neither Sec. 6(e) nor the Agreements create or require the establishment of any procedures to allow affected parties to challenge the involuntary taking after the deprivation.

Neither Section 6(e) nor the Agreements provide for any right or responsibility on the employer or any other party to review the union's unilateral determination and "certification" that 90% is the appropriate proportionate share deduction.

In short, the determination of the 90% deduction and the actual deductions take place against the background of a procedural wasteland.

All members of the proposed class are subject to the same legal disabilities.

II. THE PRESENT CASE IS GOVERNED BY THE SEVENTH CIRCUIT COURT OF APPEALS DECISION IN THE HUDSON CASE.

The controlling law in this case is the recent Seventh Circuit Court of Appeals decision in *Hudson v. Chicago Teachers Union Local #1, et al.*, 743 F.2d 1187 (1984). *Hudson* is on all fours with the present case.

Hudson examined the constitutionality of a similar involuntary fair share deduction agreement similar to the present case between the Chicago Board of Education and the local teachers' union. The agreement was negotiated

under the authorization of an Illinois statute with the same absence of procedural protections. Involuntary deductions were taken from non-members' salaries on the basis of an affidavit filed by the union president that 95% of the union dues would be a fair proportionate share of the "costs of collective bargaining process and contract administration". Neither the contract nor the state law contained any provisions allowing non-members to question the propriety of the proposed deduction.

Apparently foreseeing constitutional problems, the Chicago Teachers Union voluntarily created a procedure allowing non-union members to question the 95% deduction figure. Non-members were alolwwed [sic] to request a review by the union's executive committee. If they were dissatisfied with this result, they were allowed to request and receive as [sic] decision by an "impartial arbitrator" chosen and paid by the union.

Plaintiff in *Hudson* challenged this process in the District Court. Plaintiff *Hudson* alleged that the procedure and/or lack of procedures in the Chicago process violated her rights to due process and freedom of association under the First and Fourteenth Amendments to the Constitution. The trial judge found the procedures constitutionally valid.

On review, the Seventh Circuit reversed and remanded, finding that the procedures in *Hudson* were constitutionally deficient, violating both the teachers' rights to freedom of speech/freedom of association and their rights to due process. The Seventh Circuit stated:

> **The procedure that the defendants adopted in this case is constitutionally inadequate and they must go back to the drawing board... . We suggest that the constitutional minimum would be fair notice, a prompt administrative hearing before the Baord [sic] of Education or some other state or local agency -- the hearing to incorporate the usual safeguards for evidentiary hearings before administrative agencies -- and a right to judicial review**

> of the agency's decision. The combination of an internal union remedy and an arbitration procedure is unlikely to satisfy constitutional requirements given the nature of the issues to be decided and the union's stake in how they are decided. 743 F.2d 1187, 1196.

Under the *Hudson* decision, the procedures adopted in the present case by Defendants are a *clear* violation of Plaintiffs' constitutional rights. The only issues to be determined in the present case by this Court are:

(1) to whom will relief be given; and

(2) what will be the nature of the relief?

III. THIS CASE QUALIFIES AS A CLASS ACTION UNDER THE CRITERIA OF FEDERAL RULE 23.

Federal Rule of Civil Procedure No. 23 requires that, to be certified as a class action, a case must meet the requirements of Rule 23(a) and the separate requirements of 23(b)(1) or (b)(2) or (b)(3). As discussed below, it is respectfully submitted that the present proceeding meets the requirements of Rule 23(a) and also can qualify under each of the sparate [sic] requirements of Rule 23(b)(1), (b)(2) and (b)(3).

A. This Proceeding Meets All Four Prerequisites To A Class Action Set By Federal Rule 23(a).

Rule 23(a) sets four prerequisites that must be met if Plaintiffs are to be allowed to sue as representatives parties on behalf of all other persons in a legal situation comparable to them, i.e. all employees of the State who are not members of AFSCME, but who are, have had, are having and/or will have money withheld on an involuntary basis from their salaries by virtue of the agreements between AFSCME and CMS. The present case satisfies

all four prerequisites.

1. The alleged class is so numerous the joinder of all members is impractical.

As stated aboe [sic], over 6000 State employees are in the same situation as Plaintiffs, i.e., they are not members of AFSCME and were represented by AFSCME as the exclusive bargaining agent for State employees. CMS and the employing agencies, pursuant to the agreement with AFSCME is taking involuntary proportionate share deductions from the salaries of the class, in some cases since July 1, 1984.

2. The question of law and fact raised by Plaintiffs are common to the class.

The legal issues for Plaintiffs and the other members of the class are identical -- do Defendants' deductions violate the non-members' rights to due process and freedom of association through the lack of constitutionally accepted procedures? Plaintiffs submit that the answer under *Hudson* is "yes".

Similarly, the facts applying to Plaintiffs and other members of the class are the same. All are non-members of AFSCME. Defendants are taking a portion of their salaries based on the unilateral 90% "certification" by AFSCME. They have not been asked for or given their consent to these deductions. The remedies (or lack of same) available to each of them are identical.

3. Plaintiffs' claims are typical of the claims of the class.

Plaintiffs' claims are *identical* to the claims of other members of the class -- the AFSCME/CMS Agreements constitute a violation of each individual employees' constitutional rights to freedom of association and due process of law by taking their property without proper procedural

safeguards.

4. Plaintiffs will fairly and adequately protect the intersts [sic] of the class.

Plaintiffs filed this suit and asked for relief on their behalf and on the behalf of all members of the class and [sic] September 27 and served all Defendnats [sic] on September 30. Plaintiffs' Motion for a Preliminary Injunction was promptly set for hearing and denied. The Court, on its own motion, has directed an accelerated hearing for all matters. Plaintiffs have asked for identical relief for all members of the class.

B. This Case Qualifies As A Class Action Under Federal Rule 23(b)(1), (b)(2) And (b)(3).

1. This action may be maintained as a class action under the requirements of Federal Rule 23(b)(1)(A).

If individual non-union State employees were called upon to initiate individual litigation to assert and protect their rights, it is probable that the result would be inconsistent or varying adjudications with respect to each individual Plaintiff, which would establish incompatible standards of conduct for the Defnedants [sic], depending upon the remedy applied by the Court in each case.

As stated above, the facts and law applicable to each individual member of the class are basically identical. Furthermore, under the *Hudson* case, any individual plaintiff is automatically entitled to a ruling that their constitutional rights to due process and freedom of association have been violated by the action of AFSCME, CMS and other Defendants.

The likelihood of varying and inconsistent adjudications comes in the area of the *remedy* applied by the deciding court.

Plaintiffs have requested that all further deductions be permanently enjoined and that monies taken to date be returned. This appears to be the simplest remedy. It also places the burden of working out a constitutionally-acceptable method of making an [sic] future involuntary deductions (if this is possible without further legislation) squarely where it belongs -- on AFSCME and CMS.

If individual actions by each aggrieved State employee were allowed in lieu of a class action, one employee might win a permanent injunction, a second employee might be ordered to pay involuntary dues on a 17% basis and a third to pay on a 39.4% basis.

The above inconsistencies could lead to widely differing results which could be impossible for the Defendants to administer.

2. This action also may be maintained as a class action under the requirements of Federal Rule 23(b)(2).

AFSCME and CMS have both acted on grounds generally applicable to the entire class and final injunctive and/or declaratory relief with respect to the whole class is appropriate.

AFSCME and CMS are acting in concert, one spending and the other taking the involuntaray [sic] deductions from the salaries of all the members of the class. They are acting under color of the same state statute (Ill. Rev. Stat., Ch. 48, Sec. 1606(e)) and pursuant to the above described agreements. This proceeding was initiated by the filing of a Complaint on September 27, 1985. Since that time, none of the Defendants has offered to discontinue these involuntary deductions until proper procedures are in place and operating to protect the rights asserted by Plaintiffs on their behalf and on behalf of the class.

The actions of AFSCME and CMS are in clear violation of Plaintiffs' constitutional rights and also are in clear

violation of the rights of all members of the class. Declaratory and injunctive relief, as sought by Plaintiffs on their behalf and on behalf of the entire class, is entirely appropriate in the present case.

3. This action also may be maintained as a class action under the requirements of Federal Rule 23(b)(3).

As stated above, the questions of law and fact common to the members of the class in the present case are virtually identical. Because of this, those common questions predominate over any hypothetical questions affecting only individual members. Accordingly, a class action is superior to any other available methods of adjudication.

Federal Rule 23(b)(3) identifies four pertinent matters for the Court to consider. It is respectfully submitted that all four of these criteria support the certification of the class.

(A) Plaintiffs are unaware of any reason why other individuals in the class would want to individually control a separate action. The amount of money at stake ($16.10 per monthy [sic] for Plaintiffs) for each member of the class is relatively insignificant compared to the obvious cost of maintaining a separate action.

(B) No other litigation involving the members of the class and the Defendants' actions under the Agreements is known to be pending.

(C) This case has been filed and will be heard in the Central District of Illinois, Springfield Division. All Defendants have offices in Springfield. All members of the class are employees of the Defendant State of Illinois.

(D) Plaintiffs are unaware of any difficulties likely to be encountered in managing this action as a class action; conversely, as argued above, innumerable dificulties [sic] would arise if the problem were to be handled by indivi-

dual actions.

IV. CONCLUSION

For all of the foregoing reasons, the Court should certify the class as requested in Plaintiffs' Motion to Maintain Class Action and For Certification of Class.

Respectfully submitted,

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STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
Daniel L. Christensen, et al.,	)	
	)	
Objectors,	)	
	)	Case Nos.
and	)	89-FS-0002-C, et al.
	)	
Round Lake Education Association, IEA-NEA, et al.,	)	Before Hearing Officer Larry A. Petchenik
	)	
Respondents.	)	

POST-HEARING MEMORANDUM OF RESPONDENTS NATIONAL EDUCATION ASSOCIATION, ILLINOIS EDUCATION ASSOCIATION AND THEIR CHARGED LOCAL AFFILIATES

. . . .

[11] Unfortunately, it is likely that no matter how much information the Associations' *Hudson* information packet provided, counsel for Objectors would still protest. Recently, in *Gilpin v. AFSCME*, 875 F.2d 1310 (7th Cir. May 24, 1989), plaintiffs also represented by the National Right to Work Legal Defense Foundation argued that a notice providing information nearly as extensive as that presented here was deficient under *Hudson*. Writing for the Court, Judge Posner, author of the Seventh Circuit's decision in *Hudson*, rejected the argument. He warned that if a notice were to contain everything plaintiffs argued

for, "the notice would be as long and complicated as an SEC prospectus." *Id.* at 1316. Posner further wrote: "In objecting to the notice, the plaintiffs and the National Right to Work Foundation are merely trying to hamstring the Union." *Id.* at 1316.

. . . .

IN THE COURT OF APPEALS
FOR THE STATE OF OREGON

JAMES ELVIN, JOYCE E. BEDIENT, GARY F. BURNETT, JACK FULTON, DAVID M. GARRICK, ROLAND GIESBRECHT, HAROLD W. JACOBS, WARREN C. JOHNSON, JR., LOREN P. LINK, DENNIS D. MATTISON, DOUG SANFORD, GREGG L. SPOONER, THOMAS W. TESCH, KENNETH N. TWIDWELL, ALBERT S. WENZEL, JAMES E. YOST, and PAUL BERG,	)	Court of Appeals No. A50465 Agency No. UP 38-87
Respondents,	)	
v.	)	
OREGON PUBLIC EMPLOYES UNION,	)	
Petitioner.	)	

Petition for Judicial Review of the
Decision of the Employment Relations Board
Dated November 1, 1988

Employment Relations Board
Daniel C. Ellis, Chairman; Allen M. Hein,
and Patrick J. Mosey, Members

PETITIONER'S REPLY BRIEF

. . . .

[8] As the Seventh Circuit held in *Gilpin*, *supra*, in which the National Right to Work Legal Defense Foundation represented other plaintiffs . . . .

. . . .

[14] In *Gilpin*, . . . Judge Posner denied certification of a class of all fair share payers in the bargaining unit because the "restitution" remedy was clearly a punitive remedy which fair share payers simply seeking to minimize the cost of their own representation would not seek.[3] . . . [16] The National Right to Work Foundation in *Gilpin*, as in this case, denied it was seeking damages but characterized its claim as one for "restitution". . . .

. . . .

[3] . . . The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, ... The Foundation is seeking [refund of all fair share fees] even though the Foundation has not challenged the arbitrator's determination . . . . Not only would the "restitution" that the Foundation seeks . . . .

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

KATHRYN A. KIDWELL, *et al.*,	)	
Plaintiffs,	)	
v.	)	Civil Action No PN 85-3804
TRANSPORTATION COMMUNICATIONS INTERNATIONAL UNION ("TCU"), *et al.*,	)	
Defendants.	)	

MEMORANDUM [OF TCU] IN SUPPORT OF MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

. . . .

[16] The notice TCU provides is, in fact, very similar to the notice approved under constitutional standards by Judge Posner of the Seventh Circuit in *Gilpin v. AFSCME*, No. 88-2441, slip op. at 10-11 (7th Cir. May 24, 1989). . . . [17] The notice need not be, as plaintiffs in *Gilpin* and the present case seem to desire, "as long and complicated as an SEC prospectus[.] In objecting to the notice, the plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union." *Id.*

. . . .

Nos. 88-6617 and 88-6619

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DEBRA J. GRUNWALD, *et al.*,
Plaintiffs-Appellants-Cross-Appellees,

v.

SAN BERNARDINO CITY UNIFIED
SCHOOL DISTRICT, *et al.*,
Defendants-Appellees-Cross-Appellants.

On Appeal from the United States District Court
for the Central District of California
(Civil Action No. 87-3381-WDK)

BRIEF OF DEFENDANT-APPELLEE-
CROSS-APPELLANT
SAN BERNARDINO TEACHERS' ASSOCIATION

. . . .

[19] As we will show, plaintiffs' arguments are wholly without merit. Far from serving to vindicate the constitutional rights recognized in *Hudson*, in proposing these additional requirements "the plaintiffs and the National Right to Work Foundation [which represents plaintiffs in this case] are merely trying to hamstring the union." *Gilpin v. American Federation of State, County and*

Municipal Employees, ___ F.2d ___, No. 88-2441 (7th Cir., May 24, 1989) (Posner, J.), slip op. at 11.

. . . .

[40] When all is said and done, the additional requirements that plaintiffs seek to impose would do nothing to further the legitimate interests recognized in *Hudson*, but would serve only to place severe restrictions on SBTA's ability to collect funds it is lawfully entitled to collect. Here, just as Judge Posner found was the case in *Gilpin v. AFSCME*, *supra*, "the plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union." Slip op. at 11.[33] *Hudson*, and the Constitution, should not be distorted to serve that end.

. . . .

---

[33]Judge Posner (the author of the Seventh Circuit's decision in *Hudson*) also determined in *Gilpin* that the district court had been correct in refusing to certify a class represented by attorneys for the National Right to Work Legal Defense Foundation ("NRWLDF"). Judge Posner stated that the positions taken in the litigation by NRWLDF were inconsistent only with "the aims of the . . . type of employee" who "wants to weaken and if possible destroy the union," *id.* at 4; and the court concluded that NRWLDF "is not an adequate litigation representative of [other] employees" who "have no desire to ruin the union or impair its ability to represent them effectively." *Id.* at 5.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BARBARA CRAMER, et al.	)	
	)	
Plaintiffs,	)	Civil Action No.
	)	K88-306CA9
v.	)	
	)	Gibson, Benjamin F.
GEORGE MATISH, et al.	)	
	)	
Defendants.	)	

UAW'S MEMORANDUM REGARDING
RESTITUTION AND CLASS CERTIFICATION

. . . .

[13] The one Court of Appeals which has passed on the issue of class certification in *Hudson* agency fee cases has adopted exactly this reasoning as the basis for affirming denial of class certification. *Gilpin v. AFSCME*, __ F.2d ____, 1989 U.S. App. LEXIS 7630; 131 LRRM 2636 (7th Cir. 5/24/89) (copy attached). Judge Posner's discussion on this point is illuminating and worth quoting at length:

> The distrtict judge was right not to certify the suit as a class action on behalf of the 10,000 nonunion members. **A potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately.** See Fed. R. Civ. P. 23(a)(4); **United Independent Flight Officers, Inc. v. United Air Lines, Inc.**, 756 F.2d 1262, 1284 (7th

Cir. 1985). Two distinct types of employee will decline to join the union representing the bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. **The two types have potentially divergent aims.** The first wants [14] to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with — and only with — the aims of the first type of employee. The Foundation is seeking repayment to all the bargaining unit's nonunion employees of the entire agency fees collected by the union in the 1985 and 1986 school years (with interest), even though the Foundation has not challenged the arbitrator's determination that the union was entitled to more than it actually collected in 1985 and to 99 percent of the amount it collected in 1986. Not only would the "restitution" that the Foundation seeks confer a windfall on the nonunion employees but it might embarrass the union financially. **Yet those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent**

> **them effectively might not want so punitive a remedy.** The National Right to Work Legal Defense Foundation is not an adequate litigation representative of those employees. Nor did it or anyone else propose that the judge certify two classes.

1989 U.S. App. LEXIS 7630 at p. 4 (emphasis supplied). That same reasoning is fully applicable here.

. . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARY A. HOHE, et al., and all others similarly situated,	)	
Plaintiffs,	)	Civil Action No. 88-1348
v.	)	(Hon. William W. Caldwell)
ROBERT P. CASEY, GOVERNOR, et al.,	)	
Defendants.	)	

BRIEF [OF AFSCME COUNCIL 13] IN OPPOSITION TO PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT

. . . .

[2] Moreover, similar challenges to a virtually identical notice issued by an AFSCME affiliate in Illinois have been raised by counsel for the National Right to Work Legal Defense Foundation in *Gilpin, et al. v. AFSCME, et al.*, Docket No. 88-2441 (7th Cir. May 24, 1989). In its decision in *Gilpin* the Court of Appeals rejects many of the [3] arguments advanced by the Plaintiffs here. A copy of the Court's opinion is attached hereto. . . .

. . . .

[17] On appeal the Court of Appeals for the Seventh Circuit, in an opinion by Judge Posner, upheld the district court's rejection of the Plaintiffs' claim holding that the notice contained sufficient information to permit a fee payer to register an objection and that "in objecting to the notice, the Plaintiffs and the National Right to Work Legal

Defense Foundation are merely trying to hamstring the union" *Gilpin, et al. v. AFSCME, et al.*, Docket No. 88-2441 (May 24, 1989), slip op. p. 11.

. . . .

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARY A. HOHE, et al., Plaintiffs	) CIVIL ACTION) NO. 88-1348
vs.	) FILED) Harrisburg, Pa) JAN 19, 1989
ROBERT P. CASEY, Governor, et al., Defendants	) Donald R. Berry,) Clerk) PER /s/) DEPUTY CLERK

MEMORANDUM

Before the court is the plaintiffs' motion for class certification pursuant to Fed. R. Civ. P. 23. They assert that certification is proper under subdivisions (a), (b)(1)(A) and (b)(2). The Commonwealth defendants concur in the motion, while Council 13 opposes it.

In order for this action to proceed as a class action, initially the plaintiffs must establish that the proposed class satisfies the numerosity, commonality, typicality and adequacy of representation requirements of Rule 23(a). First, the class must be so numerous that joinder of all persons comprising it would be impracticable. Fed. R. Civ. P. 23(a)(1). Here it is asserted, and the defendants do not deny, that there are approximately 18,000 nonunion Commonwealth employees subject to the defendants' fair share fee arrangement. Joinder of all obviously is impracticable.

Next the plaintiffs must show the existence of a question of law or fact that is common to the class. Fed. R. Civ. P. 23(a)(2). They have done so. Each member of the proposed class is a nonunion employee whose wages are subject to a deduction for a fair share fee pursuant to a collective bargaining agreement between the Common-

wealth and Council 13, as authorized by Pennsylvania's Act 84 of 1988. That deduction allegedly constitutes an invasion of each class member's first and fourteenth amendment rights as interpreted in *Chicago Teachers Union v. Hudson*, 475 U.S. 292, 106 S.Ct. 1066, 89 L.Ed.2d 232 (1986).

In addition to a common question of law or fact, the plaintiffs must prove that their claims are typical of those of the class. Fed. R. Civ. P. 23(a)(3). Since all nonunion Commonwealth employees must be afforded the protections outlined in *Hudson*, regardless of whether they have objected to the fee deductions, the claims of the named parties typify the claims of the class.

The final requirement of Rule 23(a) is that the representative parties must fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a)(4). Adequate representation depends upon two factors: 1) the plaintiffs' attorneys must be qualified, experienced and generally able to conduct the litigation; and (2) the named plaintiffs must not have interests antagonistic to those of the class. *Wetzel v. Liberty Mutual Insurance Co.*, 508 F.2d 239, 247 (3d Cir. 1975). Here, the defendants have not questioned the plaintiffs' attorneys' abilities and we find no antagonistic conflict of interest between the plaintiffs and the absent class members. The union's claim that the plaintiffs' interests parallel those of only about 500 nonunion employees who have challenged the *amount* of the fee is without merit. All 18,000 employees, regardless of whether they have asserted a substantive claim via the arbitration procedures established by the collective bargaining agreement, may challenge the constitutionality of Act 84 and the procedures implemented pursuant thereto. That some class members may not at this time object to the specific amount of money withheld from their paychecks does not make their position antagonistic to that of the named plaintiffs.

Having satisfied the requirements of Rule 23(a), the plaintiffs must meet one of the three criteria of Rule 23(b). In this case they maintain that certification lies under 23(b)(1)(A) and (b)(2), which provide as follows:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the class would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> . . .
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . .

In this case, both requirements are fulfilled. If this action were not certified as a class action, other nonunion employees could institute similar suits, thus creating the risk that the Commonwealth and Council 13 would be held to incompatible standards of conduct. Furthermore, under *Hudson* the equitable relief the plaintiffs seek is applicable to all Commonwealth employees who are represented by but not members of Council 13.

Council 13 argues that even though the Rule 23 criteria are met, the court should not certify a class because class certification is not necessary, and therefore is inappropriate, in an action to declare unconstitutional and enjoin the enforcement of a law, regulation or policy. From the cases cited by the union, it is unclear whether such a rule exists in the Third Circuit. *See e.g. Carter v. Butz*, 479 F.2d 1084 (3d Cir. 1973), *cert. denied*, 414 U.S. 1094, 94 S.Ct. 727, 38 L.Ed.2d 552 (1973) (denial of class certification because precedential value of court's decision would render a judgment in favor of the class unnecessary

and because of disparate factual circumstances of class members was not an abuse of discretion); *Simpson v. Heckler*, 630 F.Supp. 736 (E.D. Pa. 1986) (class certification denied because any injunctive and declaratory relief awarded would have the effect of a class action *and* because all prerequisites of Rule 23(a) were not met). Several district courts in this circuit have refused to impose a need requirement. *See e.g., Gatter v. Cleland*, 87 F.R.D. 66 (E.D. Pa. 1980); *Gramby v. Westinghouse Electric Corp.*, 84 F.R.D. 655 (E.D. Pa. 1979); *Hummel v. Brennan*, 83 F.R.D. 141 (E.D. Pa. 1979).

In this case, where in addition to equitable relief, retroactive monetary relief is at issue, we will not decline certification. Although a court order invalidating the current fair share fee program would effectively grant prospective relief to all nonunion Commonwealth employees, absent class certification, the court could not grant to unnamed class members the reimbursement of monies already withheld from them. *Hummel*, 83 F.R.D. at 144. The court's determination of the reimbursement issue as to the party plaintiffs does have a collateral estoppel effect as to the other nonunion employees. However, it would compel them to initiate costly individual lawsuits for relatively small sums of money. *Id.*[1]

The plaintiffs' counsel have advised the court that if the class is not certified, they will file a motion to intervene on behalf of 862 nonunion employees who have retained them. Were we to deny certification, such action

---

[1]We are aware of Council 13's assertion in a footnote in its brief that if we were to conclude "that all or part of the fair share fees already collected should be returned because Act 84 fails to satisfy *Hudson*, and if this ruling is upheld on appeal, Council 13 will refund such fees as would be appropriate to all similarly situated non-member employees covered by the collective bargaining agreement." However, we prefer not to rely on that promise which is less than unequivocal. Rather than be faced with interpreting that footnote at a later date, it seems advisable to safeguard the interests of the entire class by insuring now that any order runs to the class as a whole.

would be required in order to toll the statute of limitations with respect to those nonmembers' claims. When class certification is denied, the limitations period begins running again and prospective class members must intervene or file individual actions to preserve their claims. We see no need in this case to force unnamed class members to pursue such a course of action.

Accordingly, since the requirements of Fed. R. Civ. P. 23 are satisfied, this action should be maintained by the plaintiffs as a class action under Fed. R. Civ. P. 23(b)(1)(A) and 23(b)(2). The class will consist of persons who have been employees of the Commonwealth of Pennsylvania since August 16, 1988, who have been represented by Council 13 for collective bargaining purposes, but who are not members of Council 13. An appropriate order will issue.

William W. Caldwell
William W. Caldwell
United States District Judge

Date: January 19, 1989

Supreme Court, U.S.
FILED
SEP 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-287

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC.,
Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,
Respondents.

On Petition for Leave to Intervene and Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	1
ARGUMENT	3
CONCLUSION	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-287

NATIONAL RIGHT TO WORK LEGAL DEFENSE AND EDUCATION FOUNDATION, INC.,
Petitioner,

v.

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, AFL-CIO, *et al.*,
Respondents.

On Petition for Leave to Intervene and Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF IN OPPOSITION

The opinions below and the basis for this Court's jurisdiction are correctly described in the petition for leave to intervene and the petition for a writ of *certiorari*. Pet. 2.

STATEMENT OF THE CASE

In the courts below, this was a case brought by nine employees of the State of Illinois challenging a "fair share" fee agreement between the State and the American Federation of State, County and Municipal Employees ("AFSCME" or "the Union"), covering the collective bargaining unit in which the employees worked.

Pet. App. 2a. After AFSCME made certain changes in its procedures for administering this agreement, and after an arbitration was held to determine the correctness of AFSCME's calculation of the fee (with the Union undertaking to make the plaintiffs whole in conformity with the arbitration decision), the district court entered judgment dismissing the plaintiffs' complaint. Pet. App. 3a-4a. The plaintiffs appealed this ruling, as well as the district court's denial of a preliminary injunction and that court's refusal to certify a class.

The court of appeals concluded that the preliminary injunction issue was moot, and affirmed the district court in every other respect. Pet. App. 12a. The plaintiffs have not sought review by this Court of the court of appeals decision on the merits, but one plaintiff (through his estate) has filed a *certiorari* petition suggesting mootness and asking that the court of appeals decision be vacated. *See* Petition for a Writ of *Certiorari* in *Estate of Jack Gilpin v. AFSCME*, Supreme Court No. 89-292.

The National Right to Work Legal Defense and Education Foundation ("the Foundation")—the petitioner here—funds, and through its staff attorneys litigates, legal challenges to fair share fee agreements. In this case, a Foundation staff attorney represented the plaintiffs in the court of appeals.

Three passages in the court of appeals' opinion referring to the Foundation—each of which is discussed in detail at pp. 3-7, *infra*—have given rise to this extraordinary Petition for Leave to Intervene and Petition for a Writ of *Certiorari*.[1]

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[1] The first passage is part of a long paragraph explaining the court of appeals' determination that "[a] potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately." Pet. App. 4a. The second passage concludes a paragraph in which the court of appeals explains why in the present context an alleged defect in AFSCME's

ARGUMENT

The extraordinary petitions filed by the National Right to Work Legal Defense and Education Foundation are all sound and fury and no legal substance.

The Foundation, wearing its petulant indignation like a badge, protests that it "has been 'judicially mugged in the dark' . . . . ," and that its "reputation has been sullied, its integrity has been impugned, and its ability to aid employees in the exercise of their First Amendment rights through litigation has been jeopardized by the Court of Appeals' decision . . ." Pet. 8. According to the Foundation, the three passages in the court of appeals' opinion that constitute this crime amount to a factual finding that the Foundation is "evil," made without according the Foundation due process of law. Pet. 25. On that basis, the Foundation argues that this Court must "vacate the Court of Appeals' judgment as it applies to the Foundation . . . ." *Id.*

As we now show, it is perfectly plain that nothing in the cited portions of the court of appeals decision comes close to constituting judicial error much less to generating a legal claim worthy of this Court's time and attention. The Foundation's petitions should be denied.

1. The first and longest passage the Foundation finds objectionable reads as follows:

> The district judge was right not to certify the suit as a class action on behalf of the 10,000 nonunion members. A potentially serious conflict of interest within the class precluded the named plaintiffs from representing the entire class adequately. *See* Fed. R. Civ. P. 23(a)(4); *United Independent Flight Officers, Inc. v. United Air Lines, Inc.*, 756

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fair share fee notice does not justify a restitution remedy. Pet. App. 9a. The final passage is at the end of a paragraph rejecting the plaintiff's argument that AFSCME's fair share fee notice should have contained more detailed information. Pet. App. 11a-12a.

> F.2d 1261, 1284 (7th Cir. 1985). Two distinct types of employees will decline to join the union representing their bargaining unit. The first is the employee who is hostile to unions on political or ideological grounds. The second is the employee who is happy to be represented by a union but won't pay any more for that representation than he is forced to. The two types have potentially divergent aims. The first wants to weaken and if possible destroy the union; the second, a free rider, wants merely to shift as much of the cost of representation as possible to other workers, i.e., union members. The "restitution" remedy sought by the National Right to Work Legal Defense Foundation, which represents the nine named plaintiffs, is consistent with—and only with —the aims of the first type of employee. The Foundation is seeking repayment to *all* the bargaining unit's nonunion employees of the *entire* agency fees collected by the union in the 1985 and 1986 school years (with interest), even though the Foundation has not challenged the arbitrator's determination that the union was entitled to *more* than the amount it actually collected in 1985 and to 99 percent of the amount it collected in 1986. Not only would the "restitution" that the Foundation seeks confer a windfall on nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy. The National Right to Work Foundation is not an adequate litigation representative of those employees. . . . [Pet. App. 4a-5a.]

The first six sentences in this discussion of the class action issue—which state the governing legal rule on certifying a class where there is a potentially serious conflict within the class and which delineates the two analytically distinct types of nonmember fair share fee

payers who have potentially divergent aims—*do not even mention the Foundation* and cannot possibly give rise to any legal claim by the Foundation in its own name. And those sentences are more than sufficient in themselves to support the holding and judgment below: *viz.*, that "the district court was right not to certify the suit as a class action."

The remainder of the passage merely provides a concrete illustration of how this inherent conflict may manifest itself. The Foundation's attack on these six sentences is utterly vacuous. The most straightforward way of demonstrating that much is to substitute the long cumbersome phrase "the named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney" for what is obviously the court of appeals' shorthand for that phrase:

> The "restitution" remedy sought by the [named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney] is consistent with—and only with—the aims of the first type of employee. The [named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney are] seeking repayment to *all* the bargaining unit's nonunion employees of the *entire* agency fees collected by the union in the 1985 and 1986 school years (with interest), even though the [named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney have] not challenged the arbitrator's determination that the union was entitled to *more* than the amount it actually collected in 1985 and to 99 percent of the amount it collected in 1986. Not only would the "restitution" that the [named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney seek] confer a windfall on nonunion employees but it might embarrass the union financially. Yet those nonunion employees who, while not wanting to pay more (and perhaps

> even wanting to pay less) than their "fair share" fees, have no desire to ruin the union or impair its ability to represent them effectively might not want so punitive a remedy. The [named plaintiffs in this case represented by a National Right to Work Legal Defense Foundation staff attorney are] not an adequate litigation representative of those employees. . . . [Pet. App. 4a-5a.]

Plainly this bowdlerized version is both identical to the original in legal effect and unassailable by even an organization as sensitive to blunt, fair comment as the Foundation shows itself to be.

That being so, unless this Court is to assume the role of a pedantic instructor marking court of appeals opinions for propriety of expression, there is nothing in the class action part of this case warranting further review.

We treat with the next two mentions of the Foundation together. In the midst of a lengthy discussion of the propriety of requiring AFSCME to refund all fair share fees collected from the named plaintiffs, Pet. App. 5a-10a, the court of appeals turned to the adequacy of AFSCME's fair share fee notice as amended to conform to the district court's instructions and said:

> Is this an improvement? Is it the constitutional *minimum*, as the district court thought? It is more informative, but also longer and more complex. It may invite a few more challenges, but so what? The arbitrator will order a refund to all union nonmembers who are overcharged, whether or not they file a challenge; so only one challenger is necessary. And there will always be at least one whether or not the notice is informative; the National Right to Work Foundation will see to that, you can be sure. [Pet. App. 9a.]

Later, in a further discussion of the legal adequacy of AFSCME's fair share fee notice, the court of appeals added:

> Since mounting a challenge is for all practical intents and purposes free and since only one challenge is necessary to obtain a refund for all nonunion employees, we cannot see the point in requiring the union to provide even more information than the district judge required. In objecting to the notice, the plaintiffs and the National Right to Work Foundation are merely trying to hamstring the union. [Pet. App. 11a-12a.]

Neither of these passages can possibly be characterized as an appellate finding of fact made without due process of law. The first is a mere prediction as to what the Foundation is likely to do; the second is nothing more than a statement of opinion. Both are asides in the course of the court of appeals' full legal analysis of the issues raised. Neither is critical to its determination to affirm the district court. And, of at least equal importance, neither is any part of the court of appeals judgment below which states simply:

> The appeal is dismissed insofar as it challenges the denial of the plaintiffs' motion for a preliminary injunction. Otherwise the judgment is affirmed. Costs in this court to the defendants. [Pet. App. 12a.] [2]

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[2] The court of appeals formal judgment entered the same day as the decision below reads:

> This cause was head on the record from the United States District Court for the Central District of Illinois, Springfield Division, and was argued by counsel.
>
> On considerations whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby AFFIRMED IN PART, DISMISSED IN PART, with costs in this court to the defendants, in accordance with the opinion of this Court filed this date.

While the foregoing is not reproduced in the *certiorari* petition appendix in this case, the judgment is set out at p. 35a of the *certiorari* petition in *Estate of Jack Gilpin v. AFSCME, et al.*, Supreme Court No. 89-292 (which as explained above grows out of the same court of appeals proceeding).

The Foundation, of course, does not—and cannot—challenge a word in that passage. That being so, these petitions must be denied.

2. While the foregoing is, we believe, legally sufficient, we add a few words to put this matter in context. In this Court, the Foundation strikes a jose of injured innocence, which rests on the pretence that neither the organization itself nor its staff attorney were major factors in determining what legal theories were—and were not—pursued in this litigation. The papers in this Court indicate otherwise.

As these petitions demonstrate, the Foundation is so anxious to vacate the court of appeals decision here that it has filed extraordinary papers in its own name seeking that result. In a parallel development—that it is difficult to believe is a mere coincidence—a Petition for a Writ of *Certiorari* in *Estate of Jack Gilpin v. AFSCME, et al.*, Supreme Court No. 89-292, has been filed seeking to vacate the decision below as moot. Mr. Gilpin's estate is represented by the same Foundation staff attorney who represented the named plaintiffs in the court of appeals.

In its attempt to moot this case, the *Gilpin certiorari* petition writes off most of the lead plaintiff's damage claim; asserts that the notice of appeal filed below was ineffective to preserve eight of the named plaintiffs' claims (even though neither the court of appeals nor the defendant Union has suggested that, and even though there is a substantial argument that the notice was effective); and, without a word of explanation, abandons the claims of the proposed class. *See* Brief In Opposition in *Estate of Jack Gilpin v. AFSCME, et al.*, Supreme Court No. 89-292, at pp. 4-8.

Even from our standpoint, it would not appear in the interest of the lead plaintiff's estate to write off most of its damage claims. Nor does it appear in the interest of the other named plaintiffs to assert that they have no right to seek further review of the decisions below be-

cause they did not effectively appeal the judgment dismissing their complaint. And, if the plaintiffs were right below, and the proposed class should have been certified, it is surely not in the interests of the class members to undermine their right to petition this Court for review of the denial of class certification by acquiescing in a questionable mootness argument.

* * * *

In sum, the named plaintiffs represented by the Foundation through one of its staff attorneys advanced an extreme position in the court below. That court spoke directly and firmly—but not intemperately—in rejecting that position. The Foundation should not be allowed to advance its institutional litigation interest by having the decision below depublished.

CONCLUSION

The petition for leave to intervene should be denied; in the alternative, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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